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THE ARBITRATION JOURNAL



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ARBITRATION IN INTER-AMERICAN AFFAIRS
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THE ARBITRATION JOURNAL

With the previous issues, the American Arbitration Association resumed publication of THE ARBITRATION JOURNAL, discontinued during the war. The new JOURNAL combines and is a continuation of the

International Arbitration Journal
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The Forgotten Word in International Affairs. Is it arbitration? (page 249).

Wall Street appears as a pioneer in arbitration and as a benefactor without the usual doubts and suspicions (page 261).

International Arbitration and Human Rights opens up a new subject to which the ameliorative processes of pacific adjustments may prove a source of improved human understanding and cooperation (page 272).

International Law Association at its 41st Session hears about some new essentials in private international arbitration from Sir Lynden Macassey (page 285).

Spruille Braden, Assistant Secretary of State, delivers a notable address on Arbitration in Inter-American Affairs at the Boston Conference on Distribution on the occasion of receiving the Western Hemisphere Commercial Arbitration Award (page 298).

Where are the Churches in the drive to avert another war by education in arbitration that must begin in schools, homes, offices and in the human spirit? (page 249).

Education in Arbitration appears comprehensively for the first time in a report to the Conference on International Commercial Arbitration. A new door is opened to international peace and security through a better understanding of arbitration as an economic alternative to atomic war (page 253).

Trade with Sweden. As trade resumes, Americans will wish to know more about how to arbitrate in Sweden (page 320).

Ways of Selecting Labor Arbitrators. With the expansion of Panels for labor arbitrations by government and private agencies, how *not* to select arbitrators assumes a new significance (page 306).

Accidents. With the increasing toll of accidents leading into a new high as automobiles take to the road, the problem of speedily settling claims and maintaining good-will among motorists and their insurers comes to the surface. A former Superintendent of Insurance tells how to arbitrate accident claims (page 266).

Trouble over Leases. Trouble over finding apartments may end in trouble over keeping them. The City Investing Company in New York shows the way to keep out of court and to stay in apartments (page 294).

Judge Antonio Sanchez de Bustamente—pioneer juridical friend of arbitration—is paid a long-deserved tribute by Dr. Ricardo J. Alfaro (page 317).

VIEWPOINTS

The Forgotten Word

Under the Covenant of the League of Nations, arbitration became the forgotten word—but only after a period of years. Under the United Nations Charter, it bids fair to become the forgotten word only a few months after it was so definitely written in Chapter VI. With threats of war in the ascendency in thought and inherent in acts, what has become of arbitration in spirit and action?

International Week in America

"Firsts" are always exciting events, for they usually break new trails and open new vistas and from them may be traced new currents of thought and of action. Such may be the holding of the first International Week in New Orleans, November 14-19, 1946, of which an International Commercial Arbitration Day may be an outstanding feature.

World Trade Center in New York

The establishment of a World Trade Center in New York City came closer to reality when the Legislature appropriated $100,000 for the purpose of enabling a corporation appointed by Governor Dewey to make a survey and submit a plan. On the Board, of which Winthrop W. Aldrich is Chairman, is George H. Sibley, a member of the Board of Directors of the American Arbitration Association. The Association will submit a proposal for the inclusion in the World Trade Center of an international trade arbitration tribunal in order to facilitate the settlement of any commercial controversies that may arise among those who carry on international trade at the proposed center.

Peaceful Settlement of Interreligious Disputes

Where is the church in arbitration? What part have the leaders of synagogues, temples, chapels and cathedrals taken in advancing this only known antidote to war, when disputes threaten peace and security and civilization? Dr. Everett R. Clinchy has recently suggested that they might begin by the peaceful settlement of their own interreligious disputes. But

the challenge of disputes reaches deeply into homes, shops, offices, schools and into every fabric of living where morale is breaking, faith is weakening, confidence is withering and integrity is vanishing.

The Culture of Arbitration

Internationally and nationally, prior to World War I, arbitration had no organic relation to the social and moral structure of modern society. It had little or no effect upon moulding its institutions. It did not in any degree obtain in its educational systems nor did it create or influence moral values or spiritual ideals. It was not an accepted way of thinking or of living.

But the war wrought a significant change—arbitration became an instrumentality for winning the war by keeping both morale and production at a high level. It found its way into institutions of learning and began to influence public opinion. Its conscious and systematic culture has begun and its integration as a way of thinking and of acting in normal association with other processes of American life has begun and is being carried forward in an organized and purposeful way.

The Know How Contract

Men move but slowly in the direction of procedural thinking. For every man interested in the technique of action, a thousand are concerned only with being in action. For every man concerned with bringing order out of chaos, a thousand blunder into creating it. The havoc created by the war has given us, among other things, a new instrumentality for peace and security. It is called the "Know How Contract." This is an agreement that provides not only for the orderly exchange of commodities, or the financing or administration of industrial plants in foreign countries but also for an expert to accompany the contract for the purpose of seeing whether credits are wisely used or conditions of the contract are faithfully observed.

The wisest of these so-called "Know How Contracts" protect the accompanying expert from the hazard of disputes by equipping the contract with the safety device of arbitration. By pulling this string, he parachutes to safety when beset by the dangers of sniping and cross-fire that result from disputes and misunderstandings and thus saves the investment represented by the contract and the opportunity for new and better trade relations.

Gaetano Salvemini, in the *Atlantic Monthly* for August 1946, makes a notable contribution to international arbitration by the following suggestion:

A Treaty of All-in-Arbitration

"Without asking any reform of the UN Charter, let us demand that the United States of America offer to all countries, both great and small, a treaty of all-in-arbitration. If both Britain and Soviet Russia agree, the treaty *à trois* should be left open to all other countries. If only Great Britain or Soviet Russia agrees, let the two parties to the treaty keep it open to anyone else. If neither Great Britain nor Soviet Russia agrees, let the American offer stand just the same, for all other countries. The United States is so overwhelmingly powerful that nobody would dare to reject arbitration in a dispute with her, nor could anybody suspect that her offer was aimed at strengthening herself by a diplomatic ruse.

"This method would not be a panacea for all evils. It would only be a first step to be taken by the U.S.A. to bring about a first beginning, a minimum of confidence and good will in international relations. The U.S.A. is the only country which can take that step without danger to herself or without arousing suspicion in the others.

"The obstacle against the pledge of arbitration does not arise from any objective or technical difficulty. The obstacle is in people's minds. We are confronted here with a moral, nay a religious, problem. If the rule of arbitration controls international disputes—that is, if disputes have to be settled by right and not by might—the hierarchy of great and small Powers vanishes into thin air. The only difference is between the Power which is right and the Power which is wrong.

"Are we prepared to admit that if any dispute arises between the United States and, let us say, the Republic of Liberia, that dispute, whatever its gravity, must be settled by arbitration? And if arbitration decides that the United States of America is wrong, are we prepared to maintain that the United States of America must abide by that decision and give the Republic of Liberia its rightful due? If we answer, "Yes," we can strive for peace. If we answer, "No," let us stop chatting about peace and let us frankly accept war and its consequences."

Bi-Partisan Boards of Arbitrators

Early in the history of commercial arbitration, the partisan type of arbitration quite generally prevailed. Under this plan, each party appointed an advocate arbitrator and then the parties or the arbitrators, so appointed, selected the third, or additional, arbitrator. Bias so generally prevailed in the proceeding that the Court of Appeals had this to say about it in *American Eagle Fire Ins. Co. v. New Jersey Insurance Co.*, 240 N. Y. 398 (1925):

> ". . . . the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations, and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi-judicial capacity, and should possess the judicial qualifications of fairness to both parties, so that he may render a faithful, honest, and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator. . . . ."

Under this decision, an impetus was given to the appointment of neutral boards. Labor arbitrations are now at the stage where commercial arbitrations started. Each party believes it is better protected through the appointment of a partisan arbitrator, they two to sit with an impartial person. The establishment of panels of arbitrators acting under rules that guarantee equality throughout a proceeding are gradually changing this viewpoint. But it is very gradual and panels and rules will have to be given as thorough a work-out as in commercial arbitration, to effect a more rapid change. A trend toward entrusting arbitration to one competent and wholly impartial arbitrator, instead of to a board composed of a partisan arbitrator for each party and an impartial chairman, is indicated in an analysis of the first 300 cases decided in the Labor Tribunals of the American Arbitration Association for 1946. 80.7% of those cases were submitted to a single arbitrator selected from the Panel of impartial arbitrators. 1.3% were decided by a Board of 3 impartial arbitrators, or a combined total of 82%. The remaining 18% were submitted to a board composed of representatives of employer and union with an impartial chairman from the Panel of the Association.

EDUCATIONAL POLICY AND PROGRAM
OF THE
AMERICAN ARBITRATION ASSOCIATION
AND OF ITS
ASSOCIATES IN THE WESTERN HEMISPHERE

ANTONIA HATVANY *

IN presenting a statement upon a subject so new as systematic, scientific education in the field of international arbitration, it is necessary to be objective and to describe somewhat the Western Hemisphere policy and program followed over the period of 20 years since the American Arbitration Association was organized. This approach immediately takes the subject out of academic speculation.

The concept of education is set forth in the Charter which authorizes the Association to promote the knowledge of arbitration; to study the systems, experiences and facilities of arbitration; to cooperate with other organizations in the dissemination of this knowledge; to secure the enactment and improvement of arbitration law, and to prepare, publish and distribute literature and other printed matter relating to arbitration. This authorization is in addition to the authority to create and maintain arbitral facilities, panels of arbitrators, tribunals and other arbitration machinery, and to conduct arbitrations.

EDUCATIONAL POLICY

The educational policy of the Association is based upon three precepts:

1. That technical information, instruction and training in the technique of arbitration are essential to the settlement of disputes under arbitration law, rules of procedure and generally accepted principles of arbitration, and that in proportion as these techniques are understood and followed, arbitration increases in usage, prestige and service to the

* Report presented to the Conference on International Commercial Arbitration, Paris, 1946, by the Assistant Secretary-Treasurer of the American Arbitration Association.

parties and to the community. For this purpose, technical education is provided.

2. That arbitration is a way of life in a democratic society and that the people of a country should have such knowledge of the spirit and use of arbitration as will enable them voluntarily, by themselves, to settle their own disputes in an amicable way in their homes, schools, shops, offices, trade and business relations and in other human relations. For this purpose, a general educational program is offered.

3. That general research, special studies, inquiry, investigation and the teaching of arbitration are essential to the progress of arbitration and, therefore, constitute an organic part of a system of arbitration. Provision has, therefore, been made for such research.

I. TECHNICAL EDUCATION

Technical education is intended for the use of parties in controversy, their counsel, the arbitrator and the administrator. It comprises reference books, service pamphlets and instructions. As illustrations, I may mention the publication of a *Code of Arbitration Practice and Procedure* (1931); *Suggestions for the Practice of Commercial Arbitration* (1928); Sturges on *Commercial Arbitrations and Awards* (1930); *Arbitration in Action* (1943); and cooperation with the International Chamber of Commerce in the publication of their handbooks (1927-1936). These publications, together with manuals of instruction to clerks in the 31 branch offices and a Code of Ethics for Arbitrators and special memoranda that appear from time to time, furnish the necessary technical information for the practice of arbitration. Some of these publications contain procedural forms, while others summarize the laws.

Service pamphlets are of a more general character. They describe the American Arbitration Association and the other Western Hemisphere Systems and are designed to inform persons of how the systems are established and operate.

Special education directed to the wider use of arbitration clauses in contracts has consisted of the diffusion of knowledge

concerning the laws that make such clauses legally effective and the security they afford; of offering information concerning the observance of these clauses by good faith; of studying commodity and other trade and professional groups with a view to the adaptation of clauses to their requirements, and of providing standard clauses which, if used by the parties, afford them security against defective clauses. In this special education, members of the Bar, who serve upon the Association's Law Committee, and on its Panels, have taken a leading part.

This rather elaborate system of technical education in law and practice, which must be constantly kept up to date, is made necessary by the diversity of American statutory arbitration laws, by highly differentiated commercial organizations, by the wide area over which facilities must be distributed, and by the constantly changing racial composition making it necessary to acquaint people from many countries with the American arbitration system.

It should be noted also that these technical publications and service pamphlets are, in many instances, duplicated or are especially adapted to the Inter-American and Canadian-American services, and will be continued for any new international services to which the Association is a party.

II. GENERAL EDUCATION

In quite a separate category, but closely integrated with technical education, is a program of general education. It is intended to interest business generally in arbitration and to create a favorable public opinion toward arbitration. *The Arbitration Journal,* first published in 1937, suspended when the United States entered the war, and revived in April of 1946, offers an example. The *Year Book on Commercial Arbitration in the United States,* published in 1927, was intended to acquaint Americans with all types of arbitration in operation. The translation into English and publication of Dr. Arthur Nussbaum's *International Year Book on Civil and Commercial Arbitration* was intended to be the first of a series on international arbitration, again suspended by the coming of the war. A pamphlet on *Arbitration in International Controversy* was published in November, 1944.

These publications have been supplemented by many pamphlets

dealing with specialized subjects. The recently issued pamphlet on the *Foreign Trade Arbitration Facilities and Services* of the Association was preceded by the pre-war publication called *To World Peace through World Trade.* Publications adapted to schools, bar associations, financial and business groups have been published and widely distributed through these agencies.

In this field of general education, the Association carries on what may be described as education by correspondence. Hundreds of trade and commercial organizations, banking organizations, semi-commercial clubs, schools, colleges, institutes and other agencies not only distribute its literature but make constant requests for speakers or material for speeches, for articles for their publications and information for debates, forums, broadcasts and even sermons. These are the main educational avenues through which Americans are made arbitration-conscious.

In this field of general education, a very wide use has been made of trade publications, to arouse interest and action by trade groups, through bar association and legal publications to carry on the education of lawyers; through professional groups, such as engineers, architects, accountants and others, to make them acquainted with arbitration; through school and educational publications to stimulate interest and training, and through general magazines and periodicals to bring a knowledge of arbitration to the people.

The National Panel of Arbitrators is perhaps the greatest single educational agency ever created for arbitration. Numbering, as it does, 10,549 men distributed in 1,497 cities in the United States and many other hundreds in the Latin-American Republics and in Canada, these men become the ambassadors of goodwill in their own communities and the exponents of arbitration.

III. RESEARCH

Believing that research is highly instrumental in the advancement of commercial arbitration, research occupies an important place in the American educational program. Reference has already been made to the codes and manuals and reference books which are the result of research.

It is the policy of the Association, before installing arbitration in a trade group, to study that trade in its many ramifications so the procedures will be adapted to that trade. It is the policy not

to initiate a joint agreement with other organizations in any country without a concrete study of the situation. The establishment of the Inter-American Commercial Arbitration Commission was preceded by a survey of the law and practice of commercial arbitration in each Republic and the submission of a Report to the Seventh International Conference of American States. The establishment of the Canadian-American Commercial Arbitration Commission was preceded by an extensive study of the Canadian provincial arbitration laws. The final establishment of the Chinese-American System followed quite exhaustive research and discussion of conditions in both the United States and China.

The submission of any recommendations for the use of arbitration in treaties, conventions or other international arrangements is based upon research and the presentation of the findings. While it is the policy of the Association to alert its government to include arbitration provisions in all agreements to which it is a party and where arbitration appears to be applicable, the Association does so only upon the basis of carefully prepared memoranda which embodies supporting data and source material.

As an illustration, arbitration provisions in the Convention on International Civil Aviation, as submitted to the Chicago Conference by the United States Delegation, were based upon a Memorandum prepared by the American Arbitration Association, followed by suggestions for implementing the final arbitration provisions in the form of procedures, later filed with the Provisional International Civil Aviation Organization. Also believing that many disputes arising under Chapter VI of the United Nations Charter involve economic and commercial issues, suggestions for arbitration procedure were submitted in the form appearing in the Spring (1946) issue of *The Arbitration Journal.*

IV. THE PATTERN

In this brief view of the policy and practice of the Association, an educational pattern is disclosed. It consists of a foundation of general knowledge and the creation of a basic literature and special publications for the molding of public opinion and general support of arbitration. For the users of arbitration, there is provided a highly specialized, technical education and service which is attached to each step in the procedure, and

which involves the training of arbitrators in their duties and of administrators in administering the Rules and the system. For the opening of new areas to arbitration, the solving of problems and clearing away of doubts, the improvement of laws and practice generally, a program of research is constantly developed. Interwoven in this pattern is also what may be called the culture of arbitration—that is, the pursuit of arbitration knowledge for its own sake and looking toward its recognition as a science.

V. EDUCATION IN INTERNATIONAL ARBITRATION

From the viewpoint of Americans who are looking forward to trading all over the world and who are familiar with the educational facilities and services they have available on the Western Hemisphere, they are interested in the inclusion of education in international arbitration generally. It is so vast a subject and as yet so devoid of planning that it is difficult to suggest where such a program should be begun and how conducted and how financed. It can perhaps be approached objectively and practically by presenting some of the things that Americans are looking for.

Of first importance is the assembling and distribution of information concerning the laws, practice, facilities and services in each country. Not a week passes that the Association is not asked for information. The parties to a contract call up and say, "We are executing a contract with the Chinese or the South Africans, or the Swedes, or the Belgians"—or other foreign party. "We would like to use an arbitration clause. If we use one, what will happen in the foreign country—will it carry the same assurance of speed, impartiality, low cost and legal enforcement as we have in America?" In the absence of the specific information, very often the proposal for a clause is dropped. At the present time, neither the agents of the foreign parties in the United States nor their government offices possess this information.

As a part of this assembled information there is need of a basic international arbitration literature—textbooks, reference books, special publications on various aspects of arbitration, including a good history of arbitration. At the present time, the only really available information comprises court decisions, which

leave the impression that all arbitration awards find their way into court.

The condition of arbitration law, following the war and the reconciliation of states, is little more than a black mist in the eyes of Americans. To discuss unification of arbitration law and procedures on the basis of pre-war data would not aid materially in influencing the trader in using arbitration.

We are coming into the age of the profession of arbitration. As the use of Panels grows, there will be a demand for what may be called approved *public arbitrators*. It is not too early to set about considering their qualifications and training.

We are also coming into the era of administered arbitration proceedings. The four great systems are all administered proceedings. We are hardly yet agreed upon the duties and obligations of administrators and their powers under the Rules. In the United States, the administrators have no judicial powers, and the cleavage is clearly drawn; in other countries the cleavage is not so sharp. Administrators are coming into power under governmental commodity and trade agreements, with but little clear comprehension as yet of the office.

Governments are entering rather tentatively and dubiously upon arbitration. This represents an educational opportunity that is hardly embraced in present activities. Yet we can be certain that without well-planned education—both general, to create public opinion, and technical, to obtain concrete action—this newly-found interest of governments will wither and die.

Lastly, how and to what extent shall arbitration be taught in schools of diplomacy, colleges, universities, business and law schools, schools of economics, so the future generations will know more of the subject when they come into responsible positions. And to teach arbitration, teachers themselves must be trained—a subject wholly untouched in the modern world. I wish there were time to tell you of the experiment the Association has been making in training the teachers in 11 teachers colleges in New York State with the cooperation of the State educational authorities. The response has been both extraordinarily friendly and inspiring. The steps in this program have been particularly interesting, beginning with the student teachers extending to the principals, then to the presidents of the colleges, and finally to the community.

This leads to the final question of how can small communi-

ties as a whole be educated in the principle and spirit of arbitration so as to furnish the sound basis for its wide knowledge and use? In the United States, we believe that as we become arbitration-conscious and practice-minded, we build a strong structure for international peace and security through trade and economic channels, and a foundation that is not subject to the political variations due to changing governmental administrations.

These are but illustrations of what Americans need to know about arbitration on its practical level. But there is a broader aspect that interests Americans. Nations are very far from creating a science of arbitration that can in any measurable degree oppose the science of war. They are very far from devising ways that make persuasive processes as dramatically attractive as are those of war. They are very far from creating in persons or nations that confidence in themselves which the practice of arbitration requires. They are very far from providing a culture of arbitration that is tangible and comprehensive; or from creating a framework broad enough to encompass it. And nations are very far from creating a basic knowledge of arbitration that will create a universal acceptance of its principles and potentialities. But the opportunity is here. It lies in the spirit that made the United Nations Charter possible and in the willing collaboration of capable and earnest men and women who are seeking vital ways to avoid future wars.

ARBITRATION IN ACTION IN WALL STREET

MAX JACQUIN, JR.*

Under a free enterprise system, such as we enjoy in America, and an economy based upon private initiative, business dealings are carried on almost exclusively between individuals and groups of individuals, rather than between governmental agencies or bureaus established for a particular purpose and limited in scope and objective. Business conducted under our system must, therefore, be based upon the expressed intentions of the parties in each case, rather than upon the edict or rule of thumb of some regulatory body. Good faith and willingness as well as ability to perform are accordingly essential ingredients of all business dealings under our economy. Likewise, it is inevitable that differences or disagreements as to the terms and conditions surrounding the consummation of a particular piece of business will arise.

Further the privilege of doing business under a free enterprise system, must carry with it certain obligations, not the least of which is the speedy and equitable settlement of business differences. For years the American businessman has struggled with this problem, which has become more and more enmired in the intricacies of federal and state laws and their interpretation by the respective law courts in jurisdiction. Our judicial system is a worthy one and unquestionably necessary to the survival of our American political and economic system. Settlement of civil disputes without the necessity for resorting to expensive and time-consuming litigation in the law courts has advanced in the past decade beyond the fondest expectations of those far-sighted American businessmen who have availed themselves of the facilities of arbitration for the speedy and inexpensive adjudication of their civil rights. Arbitration has become an important and irreplaceable cog in the judicial machinery of our economy.

Arbitration as a means for quickly and fairly settling differences between parties to a contract or agreement was recognized at an early stage in the development of the New York Stock Exchange and Wall Street—the marketplace of the nation and

* Member, New York Stock Exchange.

financial center of the world. In a business where transactions are effected daily in millions and even billions of dollars of values merely upon a telephone or other verbal order or consultation, it was immediately recognized that the monies involved in such transactions could not and should not be interminably tied up in extended litigation, and that immediate settlement of any difference is absolutely essential to the conduct of the business. The mere nod of a head or the single word "sold" passing between two members of the Exchange or between a banker and his client or a broker and his customer could not be delayed for the preparation of written documents on the one hand or the settlement of shades of difference in extended litigation on the other.

In the last decade of the Eighteenth Century, the original Wall Streeters who had been meeting under the buttonwood tree decided to move indoors under an organized code for the transaction of business. The underlying precept of membership on the Exchange as set forth in the Constitution was and still is the maintenance of high standards of honor and integrity and the promotion and inculcation of just and equitable principles of trade and business. In the Exchange and in Wall Street generally, these have been implemented by a simple and fair arbitration machinery.

Arbitration as such was formally established on the Exchange in 1817 by inclusion of the provision in its Constitution that "all questions of dispute in the purchase and sale of stocks shall be decided by a majority of the Board." This process for the settlement of differences was soon developed and simplified by the establishment of an Arbitration Committee of three—one of the earliest American forums for the compulsory arbitration of business disputes. Later the arbitration facilities of the Exchange were extended to provide for compulsory arbitration not only of member differences, but of those involving non-members at the instigation of a non-member.

A great many of the matters arbitrated through the facilities of the Exchange are, of course, of a technical nature peculiar to the securities or commodities business.

Most of the technical differences which arise between members can be adjusted and settled without arbitration, but the very existence of a compulsory arbitration clause provides an opportunity for their amicable adjustment.

The arbitration facilities of the Exchange are most useful in

the settlement of controversies between the public and member firms. The public always has the choice of resorting to legal channels if it so desires, but the arbitration facilities of the Exchange are available to them and a member must submit to arbitration at the instigation of a non-member.

It would, at first blush, be difficult to see any connection between the usefulness of arbitration and the arbitration facilities of the Exchange and the current everyday happenings in politics and the economic world—not to speak of such things as a hurricane or flood or other catastrophic event. During the great hurricane which swept through New England, the arbitration facilities of the Exchange were used in the settlement of claims growing out of the impairment of the validity of securities which were subjected to damage caused by the ensuing flood.

The strained economic picture resulting from financial panics and the consequent impairment of the value of equities similarly give rise to claims and differences which can best be settled through use of the arbitration facilities of the Exchange.

World War II and the dislocations in commerce and finance which it caused, the blocking of securities, the seizure by the enemy of allied wealth, all give rise to complications which, through the use of arbitration, are possible of solution without long drawn-out litigation.

Of course, the more prosaic and less spectacular everyday business dealings in Wall Street are those with respect to which the arbitration facilities of the Exchange are most useful. Does some question exist as to whether a customer has authorized a particular transaction or series of transactions? Has an account been sold out in error or through misunderstanding? What are the rights of the parties under an underwriting or distributing agreement? What are the rights of the parties in respect of "when issued" transactions in the securities of a corporation being reorganized under the bankruptcy act?

A non-member of the Exchange, whether a private citizen or professional, may require a member to arbitrate any question arising in the ordinary course of business of the member by the simple process of filing in writing a request for arbitration in which is set forth a summary of the details involved in the transaction in question.

The arbitration procedure of the Exchange is simple and free from red tape. The member or members with respect to whom

a request for arbitration is filed have ten days within which to reply thereto. Subsequently the written statements of the parties are attached to legal forms so as to comprise a formal submission to arbitration which the parties are required to sign and file with the Exchange prior to commencement of arbitration proceedings. Arbitrations by and between members are heard by members of a standing Board of Arbitration appointed by the Chairman of the Board of Governors of the New York Stock Exchange. A non-member is privileged to make a choice of a hearing before such Board or before a panel of arbitrators composed as follows: one member of the Board of Arbitration; one person selected from a panel of Arbitrators composed of persons engaged in the securities business; and three persons chosen from a panel of Arbitrators composed of persons not engaged in the securities business. A non-member must make this choice upon signing the formal submission to arbitration. Panels of Arbitrators for this purpose are also established in the principal cities of the country, such as, Boston, Chicago, Philadelphia, San Francisco, Los Angeles, etc. When the formal submission has been filed with the Exchange, the Arbitrators selected either from the Board of Arbitration or the panels, a date is set for a hearing, usually at the convenience of the parties. While neither party has the right to be represented by counsel during the arbitration proceedings, they may be so represented by mutual consent, and usually counsel is permitted where requested.

Immediately prior to the commencement of proceedings, one of the arbitrators is selected to preside and the arbitrators are sworn. Each of the parties is privileged to make an opening statement outlining his side of the case, preliminary to the presentation of written evidence and witnesses. The parties are then permitted to put in their respective proofs and to examine the witnesses of the opposing party. All witnesses are sworn and are subject to further examination by the arbitrators. A stenographic record is taken of the proceedings.

In conclusion the parties are privileged to present oral or written summations, as may be determined by the arbitrators.

The arbitrators, in their consideration of a case and in their decision, are limited to the scope of the matters presented in the formal submission to arbitration. The decision is final and binding upon all concerned, except as otherwise prescribed under the Civil Practices Act.

The arbitration facilities afforded by the Exchange have proven to be not only a speedy and efficient method for the settlement of matters in difference between members and between members and their clients, but more importantly, a means for bringing the parties together preliminary to arbitration in an endeavor to effect a compromise or settlement, where this is possible. Thus it has afforded not only a means for the satisfactory adjustment of business differences of members and of the public with members, but of creating good relations within the industry and with the public.

The New York Stock Exchange may well be proud of the part it has played in the development of arbitration as a means for the settlement of business disputes.

THE OPEN ROAD—WHERE WILL IT LEAD?

GEORGE S. VAN SCHAICK.[1]

A new peak in motor vacation traffic this summer, surpassing anything that has gone before, was seen by the National Touring Board of the American Automobile Association, which forecast that the legions of motor vacationists in 1946 would be 60,000,000 strong.

In 1943 when automobile traffic was relatively light and cars were newer and mechanically more trustworthy, 9,700,000 persons were hurt in automobile accidents—26,575 persons were injured every day.* With some percentage of 60,000,000 persons driving old and worn automobiles the prospects for an increasing ratio of accidents and of death and injury on the highways are causing grave concern to federal and state officials charged with public safety, to casualty insurance companies who will be involved in accident claims and to the courts upon whom a great burden of litigation will fall.

To casualty insurance companies, who have sought to chart a safe and steady course over what one of them has called "the troubled waters of tort litigation," this situation poses another troublesome question. Will it reproduce a set of conditions such as existed in 1931 when a "Survey of Litigation in New York" by the Institute of Law of Johns Hopkins University disclosed that, so swamped with litigation were the courts, delays in reaching trial in the various courts varied from one year in non-jury causes to two years for jury causes in the Supreme Court in New York County; in the City Court for New York County, from eight months for commercial causes to three years for general non-commercial causes; that in the Municipal Court of the Borough of Manhattan the calendar of jury causes was eight months to more than a year behind and in other boroughs of New York City as much as three years.

A later survey (1935) by the American Arbitration Association showed the congestion in the courts to be due largely to automobile accident claims and other injury cases. Lawyers

[1] Former Superintendent of Insurance of the State of New York, now Vice President, New York Life Insurance Company.

* Figures of The Travelers Insurance Company.

experienced in trial work estimated that approximately 65% of these cases involved injury claims in which insurance companies were the defendants and the delay in bringing cases to trial averaged between two and three years.

It was this emergency situation that was behind the inauguration of an experiment that enlisted the cooperation of various agencies concerned with the problem. Leaders in the field saw arbitration as a process and a procedure to dispose of pending litigation and to assist the courts in bringing calendars up to date. The American Arbitration Association took the lead by enlisting the services of a group of prominent lawyers who formed a Special Committee to stimulate greater interest and more extensive use of arbitration in the courts. They enlisted the cooperation of the Bar Associations and of the Committee on Courts of Limited Jurisdiction. Encouragement and support came from the President Justice of the Municipal Court and his Associate Justices. The writer as Superintendent of Insurance and his successor, Superintendent of Insurance Louis H. Pink, collaborated wholeheartedly in the movement. But the key group, without which the experiment could not have succeeded, was the casualty insurance companies. It was through the cooperation of the National Bureau of Casualty and Surety Underwriters, as the group was then known, that the Accident Claims Tribunal of the American Arbitration Association was launched a little more than ten years ago.

What followed is a matter of history. Fifty-three casualty insurance companies in New York City have submitted 13,925 * casualty cases actually on the City Court and Municipal Court calendars for disposition by arbitration. Emphasis was always made on the submission of "run of the mill" cases to arbitration rather than selected or isolated cases and this practice has become the rule rather than the exception.

The insurance companies thus participating have thereby refuted the charge of bad faith which sometimes was brought against them in the courts and elsewhere. These charges or insinuations were that some insurance companies used delay and procrastination in order to wear out their opponents, thus affecting settlements on inadequate terms. It was thought that such delays were oft-times secured by the demand for jury

* As of March 31, 1946.

trials in courts already overwhelmed with congested trial calendars. Through arbitration experience it has been amply demonstrated that an insurance carrier's interests are best served not by protracted delay but by a normal intervention of time elapsing between the receipt of notice of the claim and its trial. This period permits the nature and extent of injuries to become established, examinations to be conducted, investigations to be made and preparations laid for the trial. Delay beyond that time may result in possible loss of witnesses which is a matter of great consequence in a city as large as New York and in the intervention of other prejudicial factors. Tying up of reserves pending the disposition of cases is also a consideration of importance to insurance companies.

It seems to be agreed between the cooperating agencies that the following private and public benefits flowed from the extension of the use of arbitration:

1. The injured person is benefited by a quick, inexpensive and fair disposal of his claim; likewise the individual defendant or person against whom the claim is made.

2. The insurance company lessens its required reserves for accident claims and cuts its cost of settlement and retains the good will of the participants.

3. The lawyers, by representing their clients, forego none of their privileges or remuneration and have a lawyer acting as arbitrator who serves without compensation and who is selected from a list of outstanding lawyers in the community.

4. The courts and the public benefit through a reduction in the pending cases and in the cost of litigation.

5. The public benefits through the reduction in the number of cases on the calendar and through the elimination of costly jury tricks.

6. The administration of justice is promoted for delays and complicated machinery often frustrate justice, seldom advance it.

There is the additional consideration of good will, without which no company, whether it sells insurance or ice, can operate. There is no question but that insurance companies depend upon good will and public respect and confidence just as do members of the professions, manufacturers and tradesmen.

The willingness of the casualty companies to arbitrate claims has created good will on the part of claimants and their attorneys. That has been increasingly evident and frequently ex-

pressed. But that is not the only good will upon which future business depends. More important to the company is the good will and the good impression arbitration creates in the mind of the insured-defendant, the customer. Obliged under the terms of his insurance policy to assist in defending claims brought against him, the insured cannot, nevertheless, fail to resent the whole unpleasant process of litigation—the days spent in the courtroom and lost from his own personal affairs, the bitterness and the ill-feeling often present in legal proceedings and often the loss of customers or tenants in certain types of cases. It is good sound policy for all to minimize the irritations of litigation.

The aim of the Accident Claims Tribunal was not to provide adjustment machinery for the settlement of claims where a third person acts as a conciliator and attempts to bring the parties to a point where they agree. In the bulk of pending cases attempts to agree upon a settlement have been unsuccessful. The Committee's purpose was to establish a tribunal for the hearing and determination of claims on their merits by an arbitrator to whom the litigants give the powers of a judge and whose decisions they agree in advance to accept. Such simplification appeals to all who have once seen it in action.

As an example of how arbitration works take Smith's case. Smith was the owner of a small painting business. Proceeding one morning to a job in the Bronx with his working equipment loaded into his automobile, he collided at a street intersection with a coal delivery truck, resulting in injury to himself and partial demolishment of his car and equipment.

Smith blamed the accident upon the failure of the truck driver to give him right of way. The owners of the truck, however, denied responsibility. The insurance company to which Smith's claim was referred refused to go beyond a small sum in settlement of the claim in view of its insured's denial of negligence. Smith, injured and with his business completely tied up by the loss of his car and equipment and with medical and repair bills to meet, started suit to recover damages. Later the insurance company offered Smith the choice of immediate arbitration or a trial by jury at a distant date. Smith chose arbitration whereupon the following events took place:

The American Arbitration Association, through which the insurance company transmitted the offer of arbitration, com-

municated with the attorneys for both sides upon Smith's acceptance of the offer and secured copies of their respective statements of the issue between Smith and the truck owner, the amount of the claim and other questions which were to be determined by arbitration.

An arbitrator from a special panel of lawyers was appointed by the Tribunal. A time for the hearing, convenient to all concerned and to the arbitrator, was arranged. Notices of the hearing were sent out with instructions to the parties to appear at the appointed time with their witnesses and such other evidence which they might wish to present to the arbitrator.

The parties and witnesses met as scheduled in one of the hearing rooms of the Association. The hearing began promptly. There in quiet, informal surroundings, free from rigid court rules and procedure, with the aid of miniature car models and a diagram of the street intersection, Smith and the truck driver and the witness told their stories of the occurrence. Smith had none of the difficulties in securing the attendance of witnesses he might have encountered if the case had gone to trial perhaps two years later. Through a special arrangement both his doctor and repair mechanic testified immediately and were promptly excused with a minimum loss of time and of expense to Smith.

The arbitrator having given each party and each witness a full opportunity to testify and to be cross-examined then made his decision. Smith having established by a preponderance of evidence his claim of negligence on the part of the driver of the truck was awarded an amount to cover his personal injuries, cost of medical expenses and hospital treatment and of replacing his damaged car and equipment. Immediate payment of the claim and the rehabilitation of his business was assured since the arbitrator's award was filed with the court in which the action was pending and had the same force and effect as a judgment of the court.

Smith was happy even though his claim had been somewhat reduced by the arbitrator for he had secured prompt justice. His lawyer was gratified at the speed of the procedure and the opportunity to earn his fee quickly with a minimum of overhead expense and carrying charges. The insurance company, in spite of having lost the case, was satisfied that it had lost fairly and benefited by having its required reserve reduced by the disposition of the claim. After all, reputable insurance com-

panies are willing and anxious to pay promptly all valid claims on their policies.

The outstanding characteristics of the experiment above described, aside from the remarkable cooperation it has received, are that the arbitrator is a lawyer who serves without compensation; that the proceeding is free from legal technicalities and hard and fast court rules; that the injured person secures the arbitration service without cost to himself as the defending company pays a filing and hearing fee in each case and there is no further cost to either party; and that the award of the arbitrator is final and may be entered as a judgment of the court.

The possibilities of growth and development of this road to swifter, simpler justice are many. It is an open road which insurance companies of the general public may well extend. It is not only an open road but it thrives on travel. For when it has once been traversed there is every inclination on the part of those who have used it to return and benefit further from its advantages.

INTERNATIONAL ARBITRATION AND HUMAN RIGHTS

WILLARD B. COWLES *

A RELATIVELY perfect enforcement of human rights will not be accomplished immediately, if ever. Ideally, in the enforcement of an international bill of rights, a national should be able to bring his own government before an international tribunal. No such possibility is presently in the offing; and, when one considers the recent attitude of the U.S.S.R. toward the proposed international inspection of the use of atomic energy, one can hardly expect general acceptance of international supervision of the effectuation of an international bill of rights.

Even unofficial efforts to codify human rights on paper in the form of an international bill of rights during the past half decade have failed. The basic reason for the lack of success is the inability of fundamentally different ideologies to agree on the necessary broad generalizations. The stipulations of bills of rights tend to be framed in absolute terms. They must be stated as broad generalizations. This is especially true where the generalization is designed to have world-wide application. Despite this failure, the Economic and Social Council of the United Nations is solemnly charged in Article 55 of the Charter to promote "universal respect for, and observance of, human rights and fundamental freedoms" for all people. The suggestion is put forward that international arbitration has something substantial to offer the Economic and Social Council in effectuating its responsibility to promote the observance of human rights.

I

Though it is everywhere appreciated that the life, liberty, and property of a national of a country is protected to a certain extent by his own government when he is abroad, it is far less widely known that that system of protection is a system of law, or that there are many holdings of international tribunals which

* Member of the New York Bar.

are precedents concerning the international obligations of States related to human rights. It will immediately be appreciated, however, that an international legal system designed to protect "life, liberty, and property," and one to protect "human rights and fundamental freedoms" have much in common semantically, and could, in practice, mean substantially the same thing.

International law requires every State to maintain a system of government in its territory which is capable of complying with a certain minimum standard of conduct in the protection of the life, liberty, and property of the alien. As Borchard says, "the common consent of nations has established a certain standard of conduct by which a state must be guided in its treatment of aliens." International courts, in deciding cases involving aliens which have come before them, apply this international minimum standard of justice.

This requirement of a minimum standard is understood, as a practical matter, by local officials in primitive areas. When such an officer is obliged to arrest a European, a British subject, or an American of obvious position, he will not, in the usual case, incarcerate him in a filthy cell along with native felons. Occasionally, however, this sort of thing happens. When it does, it is usually the result of prejudice against the particular foreigner rather than ignorance of the existence of the standard. It is this exceptional case which finds its way to an international tribunal.

II

The determination of what the minimum standard of practice is in relation to the facts of a case is not always easy. It is arrived at, not by the practice of any one country, but by an inductive process based upon all available evidence from many, if not all, countries. Such is the task the international court, with the assistance of counsel, must assume.

At the present stage of the world's development, it is a serious matter for an international court to hold that an independent State has fallen below the minimum standard of justice required of all nations. International tribunals are therefore careful not to hold States responsible unless the cases are very clear, and the tendency of the international judge is to apply the principle that aliens should receive the same treatment as nationals, un-

less the standard for nationals is very low indeed. The established international law standard is a floor rather than a ceiling—a minimum, or low, standard, rather than a maximum, or relatively perfect, one.

III

In the actual application of the international minimum standard, one finds little evidence of international judges' merely drawing deductions from preconceived ideas of what a charter of absolute rights of aliens would include. The writer's observation is that, on the whole, the judges have shown little disposition to impose *a priori* notions on States. On the contrary, they appear to have paid special attention to the viewpoint of the judge of the nationality of the defendant country. In reaching their conclusions, they appear to have balanced the private claimant's interest against the local public interest; resolved conflicting antinomies; and worked out practical accommodations.

IV

The laws of some States are in certain respects above, and in some below, this minimum standard. Years ago Lord Palmerston pointed out the following extreme examples of practices below the international standard:

(a) To have heavy stones placed upon one's breast, and police officers dance upon them;
(b) To have one's head tied to his knees, and to be left for hours in that state; or
(c) To be swung like a pendulum, and to be bastinadoed as one is swung.

An illustration showing how such a case arises and finds its way into an international tribunal may be helpful. In any such illustration some country must be selected as being in the wrong. While practically any country might be selected, for the present purpose we select a case where the United States was the defendant.

A little over 25 years ago a young Mexican by the name of Alejo Quintanilla lived near the Mexican border in Hidalgo County, Texas. Alejo had once worked for a Tom Casey, who was the father of a fourteen year old girl, Agnes. About five

o'clock one Saturday afternoon in July 1922, Alejo was at a place in the neighborhood described as a "lonely spot." He had a lariat. As Agnes rode by on horseback, he lassoed her and threw her from her horse. She screamed and Alejo fled. Whether Alejo was lying in wait planning to assault her and later became frightened; whether it was a boyish prank to tease her; or for whatever reason he lassoed her did not appear in the record of the case.

Be that as it may, upon returning home, Agnes told her father of the occurrence. The next morning (July 16th), Tom Casey went to Edinburg, the county seat. It was Sunday. He did not find the sheriff. He then went to Donna, fifteen miles away, where he located a deputy sheriff, one Sam A. Bernard, with whom Casey lodged a complaint against Alejo. Bernard and "three other men" went to the Quintanilla home and took Alejo into custody presumably to put him at the disposal of judicial officers. Whether or not Bernard had obtained the usual warrant does not appear.

At this chronological point the report of the case states that the deputy sheriff, with one Walter Weaver, who was not an official, placed Alejo "in a motor car and drove with him, first to Casey's house, where they put on a new tire, and then in the direction of Edinburg to take him to the county jail." But Alejo was "never delivered to any jail." Even during the international adjudication of the case, between the United States and Mexican Governments, "the United States Government never reported what this deputy sheriff did with Quintanilla after he had taken him under custody." Two days later Alejo's dead body was found near the side of the Edinburg road, some three miles from that town, "traces showing that he had been taken there in a motor car."

The Mexican Consul at Hidalgo, Texas, accused Bernard and Weaver of murder. Bernard's appointment as a deputy sheriff was cancelled. Bernard and Weaver were arrested but were released on bail. The public prosecutor made investigations and submitted the case to the Grand Jury, "but the Grand Jury deferred it from 1922 to 1923, from 1923 to 1924, and never took action upon it."

Later the Mexican Government interposed itself into the case, charging the United States with international responsibility for a violation of international law, and pressing a claim on

behalf of Alejo's parents. The General Claims Commission, United States and Mexico, set up under the Convention of September 8, 1923, was then sitting. The case was referred to it, and decided on November 16, 1926.

The case raised a question, said the Commission, which it did "not hesitate to answer in the affirmative"—"whether under international law the circumstances present a case for which a government must be held liable." In its published opinion the Commission discussed the ceiling and floor aspects of the international standard as applied to the case, as follows: "A foreigner is taken into custody by a State official. It would go too far to hold that the Government is liable for everything which may befall him. But it has to account for him . . . it is liable if it can say only that it took him into custody—either in jail or in some other place and form—and that it ignores what happened to him."

It is difficult to believe that, given the facts of this case or others closely analogous, any presently existing government would hold otherwise than was done here.

Following are some illustrations, from other actual holdings, of acts or omissions by government agents which international tribunals have recently held illegal in situations where foreigners were involved:

a) "recklessly" taking human life to prevent violation of border laws and regulations;
b) failure to prosecute nationals concerned with the death of aliens;
c) giving so slight a sentence to a national convicted of a crime against an alien victim that the sentence is clearly out of proportion to the seriousness of the crime;
d) appointment of "dangerous" individuals as police officers;
e) failure to account for an alien taken into police custody and later found dead;
f) participation of troops in a murder in time of peace;
g) holding an accused person *incommunicado* over a period of from two to three weeks.

These holdings, like that in the Quintanilla case, grew out of narrow factual situations. In each case an international tribunal, after appropriate hearing, determined that a violation of the international standard of justice had taken place. The meaning

of any of these holdings can be ascertained from the facts of the situation in the particular case. They are recorded in published reports.

V

Decisions such as these thus have a characteristic not contained in a broad bill of rights; namely, that the meanings of the holdings, which are narrow, can be determined by the facts of the case. This is of the highest importance, because, although the broad generalizations of an international bill of rights are not acceptable, the decisions of international arbitral tribunals have uniformly been accepted, and they have been accepted, not only by the arbitrating States, but by other Governments which have accepted them later by implication—by making use of them as precedents in their own arguments, diplomatically or before international courts.

VI

The members of the United Nations have pledged themselves in Article 56 of the Charter to take joint and separate action, in cooperation with the United Nations Organization, to achieve the observance of human rights. A draft convention containing a prohibition against what is called "lynching" in the United States, which was carefully defined on the basis of cases involving mob violence against aliens would be much narrower and presumably less objectionable to governments generally than a broad provision, such as appears in bills of rights in this country, that no person shall be deprived of life without due process of law. Speaking more generally, it would be a relatively short step for States to agree to accept many of the precedents of the international standard for the alien as a minimum by which they would be bound in relation to their own nationals. It may not be fantastic, therefore, to be mildly optimistic that some States might agree to apply to their nationals at least a portion of the numerous international arbitral precedents. To this end the Economic and Social Council might initiate a study of the existing body of decisions of international tribunals in this type of case; have them assembled, abstracted, and digested under appropriate headings; and thereafter attempt, through the appropriate United Nations' machinery, to obtain general acceptance of an aggregation of specific, narrowly defined situations.

VII

This proposal is perhaps far from an ideal solution. Yet, though the international standard is low, it may be assumed to be worth while to establish it for the benefit of nationals of countries in which they have less rights than aliens. There would be gaps in the assembled precedents, perhaps many. Some of them could be filled from time to time by current decisions of international arbitral tribunals. By comparison with the number of international claims which have arisen and been presented to foreign offices during the last few decades, only an extremely small percentage have ever been settled diplomatically or carried to an arbitration tribunal. Many students of the subject feel, from various points of view, that the number of cases submitted to international arbitration should be increased enormously.* This is not the place to go into the various reasons for this, but the Economic and Social Council might wish to consider whether the United Nations should not urge its members to submit to international arbitration at least those claims which relate to human rights and fundamental freedoms, of which there are many. States ought at least to be willing to treat their nationals as well as they are required by law to treat aliens. International arbitration has something substantial to offer in promoting universal observance of fundamental rights.

NEWS AND NOTES

Settlement of U. S.-Philippine Disputes. The Treaty of General Relations between the United States of America and the Republic of the Philippines, signed at Manila on July 4, 1946 (Executive J., 79th Congr. 2d Sess.), provides in Art. VI for the settlement of governmental and private claims between the two countries and their nationals. Both Governments shall designate representatives who may in concert agree upon measures best calculated to effect a satisfactory and expeditious disposal of such claims as may not be covered by existing legislation.

* A suggestion that an acceleration in the submission of existing international claims to international tribunals would assist in the progressive standardization of human rights by the case method was made to Harold E. Stassen by James O. Murdock, Edgar Turlington, and the present writer in 1945.

U. S. Adopts Jurisdiction of the International Court of Justice. The declaration of President Truman, of August 16, 1946, recognizing on behalf of the United States the compulsory jurisdiction of the International Court of Justice (*), provides that the declaration shall, *inter alia*, "not apply to disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future." Such declaration puts into effect the provision of the Charter of the United Nations which, in Chapter XIV, Art. 95, expressly provides that "nothing in the present Charter shall prevent members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

Waiver of Intergovernmental Claims. An agreement between the United States and New Zealand, signed on July 10, 1946, constitutes a final settlement for lend-lease and reciprocal aid and for the financial claims of each government arising as a result of the war. Throughout the war, New Zealand provided a valuable source of supplies for the Pacific areas, under reverse lend-lease, thus relieving the United States of the need to supply considerable quantities of food and equipment to its armed forces in the Pacific. It has been agreed that neither government will make any payment to the other for lend-lease and reciprocal aid articles and service used in the achievement of victory.

Air Transport Agreements. An agreement for provisional air routes and services, to stimulate and promote a sound economic development of air transportation between the United States and Egypt led to the conclusion at Cairo on June 15, 1946, of a bilateral Air Transport Agreement which provides in Article X:

> "Any dispute between the Contracting Parties relating to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation shall be referred for an advisory report to the Interim Council of the Provisional International Civil Aviation Organization (in accordance with the provisions of Article III Section 6 (8) of the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944) or its successor."

* *Dept. State Bull.*, No. 375, p. 452.

Under this provision the Interim Council may render an advisory opinion when it is empowered to act "as an arbitral body" on any differences arising among member states relating to international civil aviation matters.* An Annex to the Agreement of June 15, 1946, in which the contracting governments accord to each other rights of transit and non-traffic stop as well as the right to pick up and discharge international traffic in passengers, cargo and mail, provides as follows:

> "The contracting parties should undertake regular and frequent consultation between their respective aeronautical authorities so that there should be close collaboration in observance of the principles and the implementation of the provisions outlined in the Agreement and its Annex, and in case of dispute the matter shall be settled in accordance with the provisions of Article X of the Agreement."

Substantially the same Agreement and Annex was signed between the United States and Lebanon, on August 11, 1946, permitting American planes to make commercial traffic stops at Beirut on the certificated route between the United States and India.

Disposition of German Assets in Switzerland. An Accord was reached on May 25, 1946, between the Governments of France, the United Kingdom, the United States, acting on behalf of the governments, signatory to the Paris Reparation Agreement,† and Switzerland, to liquidate German property in Switzerland and to make the proceeds partly available for the rehabilitation and reconstruction of countries devastated by Germany during the war. A Joint Commission, composed of the representatives of the four governments, is to be established to collaborate with the Swiss Compensation Office.

Disagreements that may arise between the Swiss Compensation Office and the Joint Commission, will be reviewed by tripartite board of which a Swiss Judge will be chairman. Should its decision not be acceptable to the Joint Commission, the three allied governments may, within a period of one month, submit the matter to arbitration before a Tribunal composed of one member appointed by the Allied Governments and one by the Swiss Government and a third member to be appointed by all

* For text of Rules, see *The Arbitration Journal*, p. 239.
† See *The Arbitration Journal*, p. 36, 247.

four Governments. Disputes of secondary importance may be submitted to the third member and his decision shall be final.*

Norwegian Arbitration Court for Settlement of Shipowner Claims. When the Germans invaded Norway in April 1940, the Norwegian Government-in-Exile, through its agency Nortraship assumed the management of approximately a thousand Norwegian ships, outside of Norwegian waters. An agreement on the disposition of ships and claims resulting from wartime measures has recently been reached between the Norwegian Government and shipowners who represented 79% of the tonnage managed by Nortraship. Of the total amount of 1796.3 million kroner to be paid by the Norwegian Government, various funds will be set aside, as pensions and social benefits for merchant seamen. An arbitration court will be created to settle all disputes that may arise out of these proceedings. This court will be appointed by the Supreme Court of Norway, and appeals from its decision may be taken directly to the highest court of that country.

British Coal Compensation Award. Compensation for the transfer of certain assets of the British coal industry to public ownership, namely, to the National Coal Board, was to be fixed by an arbitral tribunal to be constituted by agreement of the Minister of Fuel and Power and the Mining Association of Great Britain. This arbitration tribunal determined on August 1, 1946, the amount to be paid as "fair compensation" to the owners at £164,660,000 ($658,500,000) and was acceptable both to the government and the coal owners.

The United Nations League of Lawyers Encourages Arbitration. The League will hold its first annual conference on November 22, 1946, at the National Archives Auditorium, Washington, D. C. It was launched on March 30, 1946, under the chairmanship of Justice Wiley Rutledge of the U. S. Supreme Court. Lawyers from 29 nations participated and launched the organization with the following elected officers: President: Judge Wang Chung Hui, China, former President of the Permanent Court of International Justice; Executive Vice-President: John Foster Dulles,

* *Department of State Bulletin*, No. 365, p. 1121; for text of arbitration provisions, see *infra*, p. 346.

U.S.A., Adviser, U. S. Delegation, U. N.; Secretary-General: Heber H. Rice, U.S.A., former President of the Federal Bar Association; and Treasurer: Dr. Hector David Castro, Ambassador of El Salvador to the U.S.A. On motion of George B. Boochever, of the New York Bar, the following reference to arbitration was included in the statement of purposes: "to encourage the use of arbitration and judicial procedure in the settlement of international disputes."

Consultation Clause in U. S.-Paraguay Agreement. A reciprocal trade agreement between the United States and Paraguay, signed September 12, 1946, follows the pattern established in similar agreements with twenty-eight other countries with respect to the settlement of differences that may arise thereunder in that it provides for consultation through the appointment of representatives of the two governments to study its operation and make recommendations for the fulfillment of its objectives.*

It is suggested that in future reciprocal trade agreements consideration might be given to more definite provisions and directives to the consulting representatives, somewhat in the following manner:

1. Any claim that measures adopted by one of the contracting governments have the effect of nullifying or impairing the objective of the agreement may be submitted, even though the measures may not conflict with the terms of the agreement.

   Any claim should be presented in writing and should contain, if possible, a proposal for a mutually satisfactory adjustment.

2. The other government should give sympathetic consideration to the claim advanced and submit its answer in writing within thirty days.

3. If the answer or counter-proposal does not provide for a measure satisfactory to the other government, both governments should proceed, within further thirty days, to the solution of the controversy by any means of procedure —mediation, inquiry or arbitration—in accordance with agreements for the peaceful settlement of disputes in force between the contracting States.

* For text see *infra*, p. 345.

American-Brazilian Agreement on War Surplus Property. An agreement between the United States of America and the United States of Brazil, of July 5, 1946, provides for the purchase by Brazil of the remainder of property brought into Brazil for use in connection with the prosecution of World War II. The agreement provides in Article V that "in the case of any technical disagreements within this contract, each Government will appoint one representative and these two will agree upon, and appoint an expert, who, with them, will consider all disputes, and their decisions will be final on any questions of fact."

Inter-American Telecommunication Convention. At the Third Inter-American Conference of Telecommunication, held in Rio de Janeiro in September 1945, a Convention was concluded between the American States which is in harmony with the stipulations of the International Telecommunication Convention, Madrid, 1932.

The official text, in French language, of the Convention of September 27, 1945, has been published in the June 1946 issue of the *Journal des Télécommunications,* Berne, Switzerland (p. 105. Chapter VII, Art. 29). It contains nine sections on arbitration.* The first section provides that "in the case of dispute between two or more contracting governments concerning the execution of either the present Convention or its Regulations, the dispute, if it is impossible to settle it through diplomatic channels, shall be submitted to arbitration at the request of one of the governments in disagreement." The parties to a dispute may use any system or method of arbitration which is at their disposal. "If an international agreement, of general application, for the arbitration of controversies is already established, the provisions of such agreement shall prevail to the extent as they will be applicable in the respective countries of the American region" (sec. 9). Otherwise, the designation of arbitrators by each of the parties and the choice of a third arbitrator by the two arbitrators or, in case of disagreement, by lot, is provided for, as well as the determination of rules of procedure by the arbitrators themselves.

These provisions follow the pattern set forth in the Inter-

* For a translation of the provisions, see *infra*, p. 345.

national Convention of 1932 * and, unfortunately, do not take into consideration modern principles and standards of arbitration as they have recently been introduced for the settlement of disputes in international agencies.†

Pacific Settlement of Disputes between the American States. Among the Principles of International Law Formally Accepted by the American States, as recently stated by the Pan American Union (Juridical Division, October, 1946, Law and Treaty Series No. 20), there is the Pacific Settlement of International Disputes, reading as follows:

> "The primary interest of States is the conservation of peace.
>
> "The settlement of disputes or controversies of any kind, whatever their nature or origin, that may arise among the American States, shall be effected only by conciliation, arbitration, or other pacific means sanctioned by international law.
>
> It shall never be deemed an unfriendly act for any State or States to offer good offices or mediation to other States engaged in a controversy threatening or rupturing their peaceful relations.
>
> "The American States reject all methods for the solution of controversies between nations based on force, on the violation of treaties, or on their unilateral abrogation."

Thus, the Draft Declaration of the Rights and Duties of American States, formulated in accordance with Resolution IX of the Inter-American Conference on Problems of War and Peace, provides in Paragraph XII:

> "All disputes that may arise between two or more American States, whatever their nature or origin, must be settled exclusively by peaceful procedures."

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* Treaty Series No. 867.

† See *The Arbitration Journal*, p. 145.

FIVE ESSENTIALS OF AN EFFECTIVE SYSTEM OF PRIVATE INTERNATIONAL COMMERCIAL ARBITRATION

IN an address before the International Law Association at its 41st Session in Cambridge on August 22, 1946, Sir Lynden Macassey, barrister and business man, after describing rather fully the Western Hemisphere System of Commercial Arbitration, set forth the following five essentials of an effective system of private international commercial arbitration:

First: The formulation of an effective arbitration clause for inclusion in a commercial contract at the will of the parties to it which will automatically bring the arbitration system into operation for the determination of any dispute arising under the contract; and also the formulation of a simple agreement where it is desired to submit for determination under the arbitration system disputes which have arisen in connection with a commercial contract that when signed did not contain the arbitration clause.

Second: Successful negotiation with the principal business interests in the leading commercial countries, to begin with, of the Rules, which are to govern:

a) the selection and the appointment of arbitrators and their powers,
b) the procedure at arbitrations,
c) the making of the Award,
d) the fees and expenses payable in connection with the arbitration, and all other incidentals to arbitration.

Third: The setting up of new, or the adoption of existing, organizations in the leading commercial countries to act as administrators in their own country of the arbitration system.

Fourth: The enactment by the leading commercial countries of national laws which, in reference to commercial disputes, will, within their territories, make the arbitration clause and arbitrations conducted in accordance with the Rules valid and enable all awards to be enforced which are made in pursuance of them.

Fifth: The creation in connection with the United Nations Organization, or it may be as part of the administrative side of the World Court, of some authority which will generally supervise the working of the system of private international commercial arbitration and make reports and recommendations in regard to it.

In commenting upon these five essentials, Sir Lynden said:

"*Firstly,* the Arbitration Clause. The framing of that is of prime importance. The clauses of the American Arbitration Association have been so hammered out by experience to meet the needs of traders that they afford valuable guidance. I would only add one suggestion to meet what is often a real difficulty in international commercial arbitrations, that the clause should invite the parties to specify by what country's law the contract is to be construed.

"*Secondly,* the Arbitration Rules. I do not think it possible that any system of private international commercial arbitration can be operated on one set only of Rules. At the Amsterdam Conference of this Association it fell to me to submit a code of Rules that had been carefully drawn up by our Commercial Law Committee. They were rejected and referred back for further consideration. And for two reasons. They provided for judicial arbitration and excluded *amiable composition,* conciliation as it would be termed in England, which is the type of commercial arbitration in vogue in many countries of Europe. And for a second reason, delegates from countries which like the United States, Britain, and the Dominions, and certain Scandinavian countries in which judicial arbitration is customary, thought the proposed Rules were tainted with too much of the technicality of formal juridical procedure. Since then we have had the benefit of the experience of the Inter-American Commercial Arbitration Commission. Their Rules provide for the alternatives of either judicial arbitration or *amiable composition.* In view of the fact that most States of Latin South America are accustomed to the latter, I suggest that any Rules for general private international commercial arbitration will have to provide the same option.

"*Thirdly, National Administrative Organizations.* Experience has amply demonstrated, as in the case of the American Arbitration Association, that no scheme of regional, let alone international commercial arbitration, can hope to succeed unless there are one or a number of organizations in every country covered

by the scheme which can and will administer the scheme in their own respective countries. They must be organizations which are reputable, inspire confidence, maintain panels of competent and impartial arbitrators, and are prepared to afford all the necessary facilities for the conduct of arbitrations.

"*Fourthly,* Uniform International Commercial Arbitration Laws. The fourth essential I suggested was the passing by each commercial country of a uniform commercial arbitration law, sufficiently wide in its terms to give validity in every country to the arbitration scheme and to provide for enforcement of awards made under it. This will be the most difficult of achievement. The ratification by many countries of the Geneva Protocols of 1923 and 1927 has marked some advance towards uniformity but still great conflict prevails between the variant and often contradictory provisions of national arbitration laws. Much credit is due to the Rome Institute for the Unification of Private Law for the draft of the uniform national arbitration law which they have promulgated. But with high appreciation of the Institute's work, I suggest that it has approached the question too much from the continental point of view to be acceptable to the Legislatures of the United States or of the United Kingdom and the Dominions. I also suggest that if the draft could be confined to commercial arbitration, it would be removed from a considerable area of controversy. In regard to commercial matters there is a much greater approximation to uniformity by national laws than in the many other matters covered by national legislation to which the present Rome draft would apply. The English Courts have only so far recognized the validity of judicial arbitrations. They would have to recognize the validity of *amiable composition.* Whether they would be likely to do so, except under a statutory obligation, I will leave you to consider. So many Acts are being passed today in all countries that would never have been thought possible a decade ago, there is good hope that if the United Nations could agree upon a uniform commercial arbitration law, it would be generally passed by national Legislatures.

"*Fifthly, International Supervisory Authority.* The last essential I suggested was an international authority to supervise the working of the international commercial arbitration scheme. That, it seems to me, would be a necessary part of the whole

machinery. It is in line with much that is proposed to form part of the organizational framework of the United Nations. If the scheme is to be improved from time to time, as experience indicates, and if it is to be extended to include countries that develop into commercial nations, the dynamic must emanate from an international organization."

NEWS AND NOTES

Irish Linen Manufacturers. Linen manufacturers in Belfast with world-wide subsidiaries recently revised their Terms and Conditions of Sale in contract notes which contain the following arbitration clause:

> "Any controversy or claim rising out of, or relating to this contract, the performance or breach thereof, shall be settled by arbitration. Arbitration in Great Britain and N. Ireland shall be subject to the provisions of the Arbitration Act, (N. Ireland) 1937. In the U.S.A. Arbitration shall be in accordance with the Rules, then obtaining, of the American Arbitration Association; in Canada the rules of the Canadian-American Commercial Arbitration Commission; in Latin-America the rules of the Inter-American Commercial Arbitration Commission. Arbitration elsewhere shall be subject to the rules of Conciliation and Arbitration of the International Chamber of Commerce. Judgment upon the award rendered may be entered in any court having jurisdiction."

Wool Act of 1946. Statutory provision for arbitration was contained in the U. S. Cotton Standards Act, as amended by the Department of Agriculture Organic Act, of September 21, 1944, whereby the Secretary of Agriculture was authorized to effectuate agreements with foreign cotton organizations for the arbitration or settlement of disputes with regard to universal standards of cotton classification.

Similarly, the Wool Act of 1946 provides in Section 10 (e) as follows: "The Secretary of Agriculture is authorized to effectuate agreements with wool associations, wool exchanges, and other wool or mohair organizations, either domestic, foreign, or international, for (1) the adoption, use and observation of universal standards of wool and mohair grades, (2) the arbitration or settlement of disputes with respect thereto, and (3) the preparation, distribution, inspection, and protection of the practical forms or copies thereof under such agreements."

Thus, in another important area of international trade relations, governmental agencies have been authorized to enter into arbitration agreements with foreign or international organizations.

Overseas Agency Agreements. Inclusion of the arbitration clause in agreements of American manufacturers, granting sales rights to a distributor abroad either by a sales agent selling goods solely on commission or by a merchant distributor carrying stock and buying outright, was recently suggested by the Overseas Marketing Service of World's Business and Guia, the Export Business Publications, providing *inter alia* for the settlement of disputes by international commercial arbitration. The clause reads as follows:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules, then obtaining, of the American Arbitration Association. The Association is authorized to make arrangements for this arbitration to be held under these Rules in any locality or territory agreed upon by the parties or as designated by the Association. This agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court of any country having jurisdiction.

Czechoslovakia. The general arbitration clause of the American Arbitration Association is being used in a contract between an official Czechoslovakian Commission and an American motion picture producer for the licensing of motion pictures in Czechoslovakia. This appears to be the first use of the clause in postwar reconstructed Eastern Europe.

ARBITRATION GROUP WINS RECOGNITION OF TEXTILE TRADE

PAUL B. HALSTEAD *

THE Standard Cotton Textile Salesnote, which forms the first chapter of the Worth Street Rules, concludes with this significant paragraph—"any controversy arising under, or in relation to, this contract, shall be settled by arbitration. If the parties are unable to agree respecting time, place, method, or rules of the arbitration, then such arbitration shall be held in the City of New York in accordance with the laws of the State of New York and the rules then obtaining of the general arbitration council of the textile industry and the parties consent to the jurisdiction of the Supreme Court of said State and further consent that any process or notice of motion or other application to the court or a judge thereof may be served outside the State of New York by registered mail or by personal service, provided a reasonable time for appearance is allowed."

In all, three whole chapters in Worth Street Rules are given over to the subject of arbitration. These chapters deal in full with these phases of arbitration—Panel of Arbitrators, Submission Agreement and Arbitration Rules.

ARBITRATION DEFINED

Under the heading "Definitions and Trade Customs," arbitration is described as follows: "This industry has chosen arbitration rather than litigation as the means of settling its differences, and its major associations have joined in setting up the General Arbitration Council of the Textile Industry as the vehicle to make this purpose effective." Since its organization in 1930, many cases have been decided and settled under its jurisdiction. Under this clause of the Standard Salesnote, the parties to a controversy are at liberty to choose their own arbitrators, but, if agreement cannot be had, the facilities of the

* Secretary-Treasurer, General Arbitration Council of the Textile Industry.

council, including a place for hearings, are available at nominal cost. Furthermore, if either party refuses to arbitrate, a court order directing arbitration as provided therein and authorizing the council to appoint the arbitrators, may be obtained easily and quickly.

The council was organized in 1930 and over the last ten years has achieved wide recognition as a means of saving time, expense and preserving customer goodwill. Its contributions to general trade stability are incalculable. Over the last decade or so the council has arbitrated 398 trade disputes. In many instances, disputants have been prevailed upon to reach a settlement without calling upon the arbitrators for a final decision. Illustrative of the efficacy of this method of settling trade disputes is the fact that only two cases in ten years were carried forward to the courts and in both of these the decisions of the arbitration were upheld. The council is composed of representatives of these trade associations:

The American Cotton Manufacturers Association.
The Association of Cotton Textile Merchants of New York.
Association of Cotton Yarn Distributors.
The Carded Yarn Group.
The Cotton-Textile Institute, Inc.
The Cotton Thread Institute, Inc.
International Association of Garment Manufacturers.
The National Association of Cotton Manufacturers.
National Association of Finishers of Textile Fabrics.
National Association of House Dress Manufacturers, Inc.
National Association of Purchasing Agents, Inc.
National Rayon Weavers Association, Inc.
Southern Combed Yarn Spinners Association.
Textile Brokers Association, Inc.
Textile Fabrics Association.
The Wholesale Dry Goods Institute, Inc.

MANY CASES ON QUALITY

An important number of cases have been concerned with the quality of merchandise. Other cases have had to do with matters of delivery, special contracts regarding confinement of a product to certain trades, disagreements over processing under specific instructions, etc.

The rules are simple. A party desiring to start arbitration proceedings does so by addressing a request to the council in writing. At the same time he submits a copy of the contracts involved, together with a brief description of the particular points which are in dispute and his claim in the matter. Upon receiving notice, the council immediately advises the other party and requests of him a similar statement. The council also expects to receive from both parties the names of their selected arbitrators, who, in turn, are requested to agree upon the third arbitrator from the council's panel. If preferred, however, parties may agree upon a single arbitrator and have one arbitrator instead of three. A date is arranged for the hearing, and at that hearing detailed evidence is presented by the respective parties.

The panel is composed of close to two hundred men regarded as specialists in their particular divisions of the textile industry. These men serve without pay and invariably are authorities on the matters submitted to arbitration. Whether the arbitration concerns defects arising out of improper spinning, weaving, finishing or garment manufacturing, there are experts on the panel well qualified to appraise the testimony submitted. In short, the panel is a blue ribbon jury of textile technicians and market specialists.

NEWS AND NOTES

International Week in America. New Orleans is to have the distinction of initiating the first International Week in America. Its Chairman, R. S. Hecht, a member of the Board of the American Arbitration Association, says of the proposed event:

" 'International Week' will be a unique celebration. It is definitely not a convention in the usual sense but it will observe a number of events of International importance and will bring together a large and influential group of important invited guests from all over the world and of course primarily from the Western Hemisphere.

"Among these events will be the formal opening of the Mississippi Valley's International House, the delivery of the first cargo into the new New Orleans Free Port (Foreign Trade Zone) recently approved by the Department of Commerce, the celebration of the Golden Anniversary of the Port of New Orleans

as a State agency, the formal beginning of the construction of New Orleans' International Trade Mart, the inauguration of some of the recently authorized new International Air-routes, the departure on its maiden voyage of the first large new American passenger ship completed since the end of the war, special events to emphasize the growing importance of New Orleans as an international trading and transportation center, and many other festivities to demonstrate the South and Middle West's growing interest in the export and import trade of the world."

National Federation of Textiles. This Organization, established in 1872, as The Silk Association of America, refers in its 73rd Annual Report—1945 to the oldest service bureau of the Federation now in its forty-sixth year of operation, as follows: "The activity of the Arbitration Bureau, now nearing the half century mark in its record of service to the industry, was sharply curtailed during 1945. The continuance of the war during the first seven months of 1945 and a persisting shortage of rayon yarn caused rayon fabric to remain very "tight." As a natural consequence of this condition, the number of arbitration cases filed was only two. The more pressing problems of securing yarn and fabrics overshadowed the customary controversies which arise from sales and purchases in a normal market, and the number of cases filed during the year simply reflected the tenor of the times."

War Contract Settlement. "By June 30, 1946, the objectives for which the Office of Contract Settlement was created by the Contract Settlement Act of 1944 had largely been achieved," is the introductory statement of the Letter from the Director of that Office, dated August 2, 1946.* It may be recalled that the Act of July 1, 1944 made arbitration available by agreement with any procurement agency of the federal government. 96 percent of 305,155 contracts have been settled as of June 30, 1946; a relatively small number of large terminations concentrated in a few companies has to be settled in the near future. The Report describes the different settlement operations and the progress which was made in plant clearances and interim financing, thus making evident how cooperation between Gov-

* *House Document* No. 768, 79th Cong. 2d Session.

ernment and industry has solved the problems of reconversion connected with the settlement of numerous war contracts which were terminated at the end of the war.

Arbitration in Apartment Leases. Introduction of arbitration into the relationships between tenant and landlord is a feature of new leases now being signed by the City Investing Company in New York. Each lease contains a clause which provides that should government rent controls be removed entirely tenants may request arbitration if they are dissatisfied with the rental value placed on a property by the owner. Arbitration will be conducted under the Rules of the American Arbitration Association and it is agreed the result will be binding for both parties. The clause has been incorporated into the leases on 200 apartments owned or managed by the company in New York, Syracuse and Washington, and the same provision will be included in future leases for more than 500 tenants occupying commercial property under the control of the City Investing Company.

Increased Arbitrations Follow the Resumption of Trade. An increase of 23% in the number of commercial cases and 5% in the number of labor cases submitted over the number filed in the same period last year, marked the first four months of 1946 in the Tribunals of the American Arbitration Association.

Particularly notable was the number of cases involving foreign trade, which were submitted despite the severe handicaps encountered by that business due to various governmental restrictions and difficulties of foreign exchange. Among those cases were disputes concerning Turkish tobacco, caustic soda for delivery in Mexico, lambskins from South Africa, Hareskins from the Argentine, woolen goods for export to Europe, and a dispute involving machinery between an Illinois manufacturer and a distributor in England.

In the domestic field, there was a wide variety of cases submitted; noteworthy was a case involving a patented aluminum device for preparing and serving hot meals to personnel in office buildings and factories, which was being developed by an aircraft company as a peacetime product; also a dispute involving the use of a patent for black light in the illumination of Christmas tree ornaments; and another involving the right to the use of the name of that well-known radio character "Henry Aldrich."

The first four months also noted the filing of cases in the building industry for the first time in several years, and the filing of cases under the Emergency Rent Law.

Government Agencies Authorized to Arbitrate. The Federal Tort Claims Act Sec. 413, constituting Title IV of the Legislative Reorganization Act of 1946, of August 2, 1946, provides under the heading "Compromise" that "With a view to doing substantial justice, the Attorney General is authorized to arbitrate, compromise, or settle any claim cognizable under this part [Part 3: Suits on Tort Claims Against the United States] after the institution of any suit thereon, with the approval of the court in which such suit is pending."

Arbitration Clause in Private Trust Indenture. The following arbitration clause has recently been embodied in a private trust indenture under which the Fiduciary Trust Company of New York acts as trustee:

> "Any controversy or claim arising out of or relating to this Agreement may with the written consent of the Trustee be settled by arbitration by three arbitrators in accordance with the rules then obtaining of the American Arbitration Association. Each party to any such controversy or claim shall appoint one arbitrator who may or may not be a member of the National Panel of Arbitrators established and maintained by the American Arbitration Association, and the two arbitrators so selected shall appoint a third one, and if no agreement as to such third arbitrator can be reached, then such third arbitrator shall be appointed by the American Arbitration Association. The arbitration shall be held in New York in accordance with and full observance of the laws of New York. Judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction thereof."

WESTERN HEMISPHERE COMMERCIAL ARBITRATION AWARD PRESENTED TO THE HONORABLE SPRUILLE BRADEN *

Mr. Chairman, Ladies and Gentlemen:

It is highly significant of the progress of commercial arbitration that so important a meeting as this Boston Conference on Distribution would include arbitration on its agenda and that you have given me the honor of introducing to the Conference an eminent and distinguished pioneer in the organization of commercial arbitration in the Western Hemisphere. American businessmen do not yet fully realize the broad vision which encompasses plans for the worldwide extension of commercial arbitration facilities. They will be made aware of this by persistent educational campaigns in the future.

In 1946 the American Arbitration Association did issue a statement upon the foreign trade arbitration facilities and services which it has made available to American businessmen. In addition to the services now provided in more than 1,500 communities in the United States, through the organization of Inter-American and Canadian-American systems commercial arbitration is now firmly established in the Western Hemisphere with a body of some 12,000 business and professional men enlisted in its service.

Through arrangements with the International Chamber of Commerce and by the extension of the American idea of multilateral and bilateral commission arrangements based upon Western Hemisphere concepts and experience, arbitration facilities and services will soon be available in many countries, particularly in the Far East through arbitration commissions to be established in Hawaii, the Philippines and China.

While these achievements represent the cooperation of many

* Introductory Remarks by Mr. James S. Carson, Vice President, American Arbitration Association, and Chairman of the Western Hemisphere Conference on Foreign Trade and Arbitration, in presenting the Western Hemisphere Commercial Arbitration Award to the Honorable Spruille Braden, October 14, 1946.

men and organizations, it is due to the vision, the courage and the leadership of one man that we have the Western Hemisphere system of arbitration that serves the commercial interests and welfare of twenty-one countries and has been used as a basis and guide to establish arbitration facilities on a global scale. It was he who in 1934 took the lead in creating the Inter-American Commercial Arbitration Commission and he thus carried a message of friendship and security to the American republics through the establishment of arbitration facilities and services in all of the republics. It was his vision and encouragement that lead to the creation of the Canadian-American Commercial Arbitration Commission. Even in this year of 1946 in the midst of the cares of an exacting public office he has made possible a revivification of postwar interest in commercial arbitration in the American republics which have been recently visited by the Secretary of the Inter-American Commercial Arbitration Commission.

Within the brief span of twelve years under his Chairmanship, and more recently under his leadership as Honorary Chairman, the Inter-American Commercial Arbitration Commission has developed the most unified system of combined tribunal facilities and services and education and advancement in legislative standards in the entire history of commercial arbitration. For this unfailing support of commercial arbitration, for his wise leadership in its development, and his constant thought and devotion to its ideals as an instrumentality for advancing the welfare of nations and their cooperation and friendship, in the name of the three organizations comprising the Western Hemisphere system of commercial arbitration—that is, the American Arbitration Association, the Inter-American Commercial Arbitration Commission, and the Canadian-American Commercial Arbitration Commission—I have the honor and privilege of presenting to Spruille Braden this Western Hemisphere Commercial Arbitration Award as an expression of appreciation and gratification because he has made possible the keeping of commercial peace in and among twenty-two countries of this hemisphere.

ARBITRATION IN INTER-AMERICAN AFFAIRS *

For the hospitality of the Boston Conference on Distribution and for the privilege of addressing this distinguished audience, I am deeply appreciative.

To this acknowledgment of my indebtedness, I add the expressions of my profound gratitude to the American Arbitration Association and the Inter-American and Canadian-American Commercial Arbitration Commissions for the honor they have done me by the presentation of the Western Hemisphere Arbitration Award. Always I shall cherish the recollection of their generous recognition of my efforts on behalf of arbitration and as through the years I proudly show this plaque I shall, Mr. Carson, recall the graciousness of your words.

I trust everyone here will sense the depth and sincerity of the feeling with which I say: I thank you!

Early in my career I became a firm believer in commercial arbitration and my dedication to that cause has since been increasingly fortified as I have witnessed its constructive achievements both in the domestic and international fields.

Curiously enough my interest in the pacific settlement of disputes was first aroused by playing water polo at Yale. Consider the theory behind this gentle pastime: one spends, as you know, much of the game under the surface of the water, soothing one's opponent by the strangle hold and scissors, which one applies for the purpose of replacing the air in his lungs with the maximum possible amount of water. When dexterously executed this sort of caress persuades the opponent to relinquish the ball; sometimes it even relegates him to the more oxygenized atmosphere of the dressing room.

As a survivor of this mild mannered sport it was not unnatural that I became interested in the so-called water test, once widely employed in the East Indies as a method of settling disputes. There the litigants plunged simultaneously into the water, and the one who first emerged for a breath or collapsed while still under water lost his case. Sometimes professional divers were

* Address by the Assistant Secretary of State, in accepting the Western Hemisphere Commercial Arbitration Award, at the Luncheon of the Boston Conference on Distribution, October 14, 1946.

employed, as attorneys of a sort, and hundreds of delighted spectators attended the "trials" and applauded the participants.

This investigation into the art of accommodating differences through aquatics aroused my curiosity, and further exploration revealed to me that the first arbitration negotiated in this country was here in New England—specifically, in the New Haven Colony, although not, I hasten to add, involving the Yale water polo team. History indicates that before the New Haven Colony merged with that of Connecticut in 1665, the courts often advised the parties to a dispute that "it were better if they could 'issue it' by some friends in a private way, especially where it is a 'darke case' or the business hath many questions in it."

In many ways, it was no further cry from the "diving-ordeal" of India, Burma and Borneo to the "issuing" of a dispute "by some friends in a private way" in that New England Colony than it is from the latter to the modern, equitable and highly efficient arbitration system as it is organized and operated by the American Arbitration Association and its sister institutions.

Indeed, I dare say that an accurate gauge of man's progress would be the measure in which reason predominates over force in the management of his affairs.

The Spanish essayist, Salvador de Madariaga, recently wrote that "not since the times of Erasmus have more grave and insidious dangers weighed against liberty than those which today threaten to destroy it." He added that the most important labor of our era is to rescue the liberal spirit from three interrelated and mortal perils which he specified as "the cult of force, the tendency to give precedence to material over moral values, and verbal confusion."

The American republics were conceived in liberty and their peoples possess the "liberal spirit." It is natural, therefore, that reason takes the place of force, that moral values be supported irrespective of material considerations and that the clear expression of their obligations, rights and purposes be the guide posts of these republics in the conduct of their international relations. In order that the most ample and favorable opportunity may be afforded for the exercise of liberal principles, the countries of this hemisphere, in a spirit of international cooperation and continental solidarity, have adopted the procedure of consulting freely and frequently with one another on matters of common interest. In this way potential differences

have been caught at their inception, before they have become irritants and before irrevocable stands have been taken or the stubbornness of human vanity has spread its paralyzing poison. Through frank interchanges of divergent opinions the heat and clamor of argument have been dissipated by a true knowledge of the facts and mutually satisfactory accommodations have been reached. In other words, our governments endeavor to prevent any "darke case" that "hath many questions in it" even from arising. This they do by taking the first step of the arbitral procedure, i.e., discussion, the untrammeled discussion of those who are equal before the law.

To get together in a friendly and intimate atmosphere, free from the glare and provocative light of public scrutiny, in order to talk over differences may be highly effective under any circumstances, but the most favorable results are achieved when it is done under experienced guidance. The Inter-American and Canadian-American Commercial Arbitration Commissions offer that guidance. Throughout the hemisphere, they have established in every important center what may rightly be called Clinics for Preventive Law. Their scientific approach, comparable to that of Preventive Medicine, under the auspices of trained conciliators, brings together men who have fallen out in their business dealings. Differences which appear obscure and intangible from afar become clear and concrete when thus expertly examined near at hand. The respective strengths and weaknesses of both sides are put in balance. This talking things over with or in the presence of an impartial third person has a calming effect. Each disputant develops an ability to put himself in the other fellow's place and to recognize that what he had thought was coal black or pure white, in reality is often grey. Frequently some prejudice or linguistic or other misunderstanding is found to have influenced one or the other party more than the actual points at issue. These influences once discovered in discussion are often readily removed and satisfactory settlements are concluded.

As a result of these mediatory conversations 90 percent of all the claims referred to the Inter-American Commercial Arbitration Commission are adjusted without even the appointment of special arbitrators. That is to say, fact-finding, conciliation and mediation go hand in hand with arbitration.

The overwhelming majority of the remaining 10 percent,

which actually get to arbitration, are fairly and satisfactorily settled—and far more expeditiously and inexpensively settled than they ever could have been by courts of law. In fact, when the parties reside in different countries, it is extremely difficult for jurisdiction to be established, or for execution thereof to be obtained. Hence, in international commercial dealings, arbitration becomes not only the best but well-nigh the only practical and economical procedure. Any business dispute which crosses national boundaries and which arbitration does not resolve may very possibly remain permanently unresolved.

I vividly recall how the boom and subsequent depression following World War I created countless misunderstandings among the merchants of the American republics. Practically no effective arbitration facilities then existed and most of the disputes remained unadjusted, were left to fester and caused ill-will, which seriously prejudiced our friendly relations. It is indeed fortunate that we now possess, in the Inter-American Commercial Arbitration Commission, a fully competent and trusted organization which can and does isolate the disputes, applies to them preventive and curative measures and so averts a plague of disagreements, which otherwise would undermine the business health of the hemisphere. This Commission, I understand, has become the most extensive and unified system in the history of arbitration. It consists of 100 members in all of the American republics. There are 18 national Committees. These, the arbitral panels and others involved in the Commission's work total 1,036 persons. The cases presented to it have covered about 25 different types of disputes. During the recent war the Commission has settled literally hundreds of claims and controversies. It will continue to do so in peacetime.

So desirable does the Department of State consider the arbitration of business disputes between its nationals and those of other countries that it is incorporating suitable provisions therefor in the proposals it is now advancing for commercial treaties with a number of other governments.

Certainly the inclusion of such stipulations on arbitration will create a confidence, which, implemented by the widespread services offered by the Inter-American Commercial Arbitration Commission, will ease the way for, speed up and therefore increase the interchange and distribution of goods throughout the 21 American republics. I submit that here is a highly valu-

able instrument of trade, whose employment merits the full endorsement and support of the Boston Conference on Distribution.

As a disciple of the Jeffersonian proposition that ideally that government is best which governs least, I believe industry and commerce should resort so infrequently as possible to government, even in its capacity as a dispenser of justice, and instead they should provide for themselves the maximum attainable to essential regulation. This the American Arbitration Association and the Inter-American and Canadian-American Commissions do most competently by privately ironing out misunderstandings and disputes. They both typify and augment the efficiency of private enterprise.

In this latter connection, I have publicly and repeatedly put on the record—as I did four weeks ago in Chicago—my conviction "that private enterprise is the best and in most circumstances the only really sound means to develop the known or unknown resources of a new country." I underscore this point now because if we wish substantially to increase the distribution of our goods in the other republics and of theirs here, our private enterprises must, with their capital and techniques, collaborate with those countries to increase their national wealth and to raise standards of living. There is one way and only one way by which standards of living and real wages can be raised, that is, by increasing per capita productivity through the adoption of the most modern machinery, tools and methods, and by efficient management. The job, at best, will be long and difficult, but it must be done. In the measure that it is done throughout the hemisphere, the general level of production will rise; correspondingly distribution will be wider and the interchange of goods will increase. The welfare of all our peoples may be enhanced by higher standards of living based on higher real wages and greater access to the good things of life.

This is a challenge to private enterprise which, I am confident, it will more than meet. It is not a proper undertaking in which to use either government funds or administration. Government, with certain strictly limited and manifest exceptions, should stay out of business. The United States fought and made its decisive contribution to winning the war in order to eliminate the danger of totalitarian ideology and stateism. To permit them now to rear their heads in our midst, in the economic or any other area, would be a repudiation of the "liberal spirit" for which we stand

and would mean that we had lost the Peace! We of the Americas, as has been made abundantly clear by the statesman of this hemisphere, are irrevocably opposed to unnecessary intervention by the State in our private affairs.

In order to assist in converting these concepts I have expressed, into concrete programs, the Department of State is anxious in every appropriate way to cooperate and counsel with private enterprise.

In this New World we want none of the rigidly regulated and *static* equilibrium which in the end spells death. We are opposed to the freezing of our economic relationships in the name of economic security, to the denial of opportunity and the frustration of initiative, for this is the palliative that eventually kills. Instead, we want motion, the free play of enterprise, the *dynamic* equilibrium between economic security and economic opportunity, the steady, vigorous progress of compelling competition under democratic capitalism. Of course, motion creates friction and heat, which will destroy the machine unless there is an effective cooling and lubricating system. Precisely such a system—and a highly efficient one—fortunately exists in the form of the arbitration organizations, which have so signally honored me on this splendid occasion, and which are themselves deserving of all honor from those of us who cherish the cause of international peace and prosperity.

NEWS AND NOTES

Cuban Sugar Contract. The 1946 and 1947 Cuban Crops Purchase and Sale Contract, recently executed between the Cuban Sugar Stabilization Institute and the Commodity Credit Corporation, follows, as far as arbitration is concerned (Part IV, Article 3), very closely the wording of the arbitration clause contained in the 1945 Contract and reprinted in *International Arbitration Journal* (1945), p. 121.

Inter-American Convention on Commercial Arbitration. The Inter-American Commercial Arbitration Commission proposes to submit to the Ninth Conference of American States the draft of a Convention which would permit the American States to adopt uniform arbitration laws based on the principles which

were approved by the Seventh International Conference of American States in 1933. The Arbitration Committee of the Central Chamber of Commerce in Chile resolved recently to organize a system of uniform commercial arbitration for the solution of claims and controversies that arise in trade and commerce.* The Executive Committee of the Inter-American Council of Commerce and Production, at its Twenty-First Meeting held in Buenos Aires in June, 1946,† studied the proposal of the Inter-American Commercial Arbitration Commission and agreed to state its adherence to the conclusions adopted by the Central Chamber of Commerce in Chile. In addition, the Inter-American Council has placed the topic of Commercial Arbitration on the Agenda for the Third Plenary Session of the Council scheduled to meet during the early part of 1947.

Chamber of Commerce of Bogota Wins Importers Guide Award. Colombia, home of the first modern arbitration law in South America, has won new honors through the designation of the Chamber of Commerce of Bogota to receive the *Importers Guide* Arbitration Award. The Award is presented annually to a commercial association in Latin America in recognition of outstanding service in the promotion of arbitration in international trade.

The Chamber of Commerce of Bogota was instrumental in obtaining a modern arbitration law for Colombia in 1938 in accord with the principles and standards set forth by the Seventh International Conference of American States,‡ and is one of the most active associates of the Inter-American Commercial Arbitration Commission.

Argentine Chamber of Commerce. The recent Annual Report of the *Camara Argentina de Comercio* in Buenos Aires mentions the following with regard to the Arbitration and Conciliation Council (*Junta Arbitral y Conciliadora*): "The Arbitration Tribunal of the Chamber had the occasion to attend to various differences which had arisen between businessmen for which purpose the Tribunal acted in accordance with the rules that

* See *The Arbitration Journal*, p. 189.

† Report in *Boletin Informativo*, Junio 1946, No. 20, p. 2.

‡ For translation of the Colombian Statute, see *International Arbitration Journal* (1945), p. 212.

had been approved in the previous year. It is regrettable that more firms do not realize the value of this procedure which is both prompt and amicable and which often succeeds in solving a disagreement by the sole expedient of uniting the parties in conflict."

Mexican Arbitration Association. An *Asociacion Arbitral Mexicana,* with an office in the building of La Nacional in Mexico City has recently been established by Mexican lawyers for maintaining a permanent tribunal to settle domestic, civil and commercial disputes. Three arbitrators will decide issues under legal principles or as friendly compounderes as the parties may agree.

Machine Tool Export Group Uses Arbitration Clause in Distributor Contracts. Recently thirteen leading firms of the machine tool industry of the United States combined their export facilities into a centralized organization known as the American Machine Tool Export Associates. This newly created export group has included the arbitration clause of the Inter-American Commercial Arbitration Commission in its standard distributor contracts.

Modernization of Chilean arbitration law studied by Valparaiso Bar Association. A project has been undertaken by Dr. Juan Andueza, President of the Bar Association of Valparaiso, Chile, to modernize Chilean arbitration law in accordance with the principles set forth by the Seventh International Conference of American States held in Montevideo, 1933. A questionnaire of the Inter-American Commercial Arbitration Commission on the present status of arbitration law and practice has been reprinted in the August 1946 issue of the *Boletin del Colegio de Abogados de Valparaiso.*

HOW TO SELECT A LABOR-MANAGEMENT ARBITRATOR

"Blind Man's Buff"—or an Open-Eyed Choice?

PAUL FITZPATRICK *

WHAT provision should the parties make in their collective bargaining agreement or in their submission to arbitration in order to insure the services of an impartial, unbiased arbitrator in whose qualifications they will have justifiable confidence?

First, the parties to an agreement should decide upon the number of arbitrators desired to determine the issues between them—whether it shall be a single arbitrator, or a board of three, or five, or more.

Then, there are numerous ways in which provision is made for the appointment of an impartial arbitrator. Under those most commonly used, the parties may—

1) agree upon a single arbitrator, and name him (and perhaps an alternate) in the contract;
2) provide for naming a single arbitrator, by mutual agreement, when and if disputes or grievances arise;
3) leave to an outside agency, or to an individual, the naming of the impartial arbitrator;
4) provide that each party will name one arbitrator (or more), and leave selection of the impartial arbitrator to the agreement of the two so chosen, or to the mutual choice of the parties;
5) agree upon a board composed of an equal number of arbitrators appointed by each party;
6) agree to have a single impartial arbitrator, or a board of arbitrators, appointed under the Rules of such an agency as the American Arbitration Association.

None of these methods is fool-proof; none perfect. Some are risky or dangerous or unwise. Others have proved by experience and trial-and-error tests that they are as nearly sure-fire as they can be made. It might be well to examine them briefly.

* Administrative Vice President, American Arbitration Association.

1. NAMING THE ARBITRATOR IN THE CONTRACT

The naming of the single arbitrator in the agreement is the simplest form of selection and, except for the usual vicissitudes of death, illness, or inability to serve at a given time and place, is not infrequently satisfactory. But there is also the risk that hindsight may prove better than foresight, and the parties may find they have made a bad bargain if the contract has a long period to run, for the named individual's viewpoint, or philosophy, or self-interest, or position, may change during the time his services are under contract.

It is also possible that the permanent arbitrator may become, by gradual degrees, an auxiliary arm of management authority without corresponding responsibility to management. There is sometimes developed a tendency for employees to run to him for settlements that should, if possible, be reached direct with the supervisory and administrative staffs of management.

2. MUTUAL CHOICE OF ARBITRATOR AFTER DISPUTE ARISES

Under this arrangement the parties "agree to agree" upon an arbitrator when and if a dispute arises. This method assumes the permanent continuance of the parties' ability to agree which was manifest when they entered into their contract. If that should turn out in fact to be the case, there would not be too great difficulty in reaching agreement upon an arbitrator. Labor-management relations often improve under a collective bargaining agreement. But should there be unsettled grievances, they can also worsen rapidly, and to a point where neither party will accept the suggestion of the other as to who should arbitrate. The rendering of an agreement into writing is a tacit admission of the possibility of dispute. The inclusion of grievance machinery, with arbitration as a "terminal point," is a frank acknowledgment of that possibility. Dispute over one subject has never yet predisposed parties to agreement over another. So it is the better part of wisdom that provision should be made against a deadlock in the choice of arbitrator in the event inability to agree occurs when the dispute emerges. In some States (New York, for example) the Court can step in where there is such a deadlock and name the arbitrator.

3. LEAVING CHOICE OF ARBITRATOR TO GOVERNMENT AGENCY OR INDIVIDUAL

If the parties want to take the easy course, and leave to an outside individual or a Federal or State agency the selection of the arbitrator, it is a simple matter to name an individual of known integrity—a judge, a clergyman or a citizen of standing in the community—who is given power to appoint the impartial arbitrator if, as, and when a dispute arises. In this form of selection it is to be noted that not alone do the ordinary vicissitudes apply to the appointing individual, but in the event selection is made according to plan, the arbitrator may easily be entirely unknown, or quite unsatisfactory, to one or both of the parties; he may be selected from a limited group of acquaintances, none of whom possesses all the qualities necessary to the labor arbitrator. He may have had no experience with job analyses, wage stabilization schedules, or the myriad complications with which the labor arbitrator is confronted today.

In one case under this type of clause, power to name the arbitrator was vested in the president of an organization. When the arbitrator was needed, the president had entered military service and the organization was temporarily without a president. One of the parties refused to delegate authority to another officer of the organization, arbitration was frustrated, the grievances multiplied, and a strike ensued.

In another case, the individual named demurred at being drawn into the controversy between the parties and refused to name the arbitrator. There was considerable delay before the parties reached an agreement to select the arbitrator under the procedure of the American Arbitration Association.

If power to appoint the impartial arbitrator is delegated to an outside governmental or state agency, such as the U. S. Conciliation Service, or a State Mediation Board, certain elements of chance are reduced, but certain others are increased. The element of "Hobson's choice" remains in full force. The parties should be well acquainted with the *modus operandi* of the agency named, and with its political interests, affiliations, and also characteristics.

4. NAMING OF IMPARTIAL ARBITRATOR BY TWO ORIGINAL APPOINTEES

The provision whereby each side will select an arbitrator, the two so appointed to agree upon a third, is one of the most common, and one of the most trouble-making of arbitration clauses. What is frequently overlooked is a means of breaking the deadlock if the two partisans cannot (or will not) agree on an impartial third. If, however, the parties go further and agree that within a specified, limited time the "named" arbitrators' power to appoint lapses and is automatically transferred to an impartial outside agency, the procedural defect is thus cured, but the parties may be deprived of an effective voice in the choice of their "judge," contrary to the original intention.

Perhaps more basic than this procedural defect is the fact that two of the three arbitrators are presumptively partisan advocates of the parties appointing them. Thus, the arbitration board is composed of one impartial arbitrator and an advocate for each of the opposing parties. A board so constituted would seem to be less efficient than a board appointed by a method which assures the impartiality of all the arbitrators.

The composition of such a board also presents the following questions for determination by the parties:

a) Shall the award be by majority or unanimous vote?
b) Should the impartial arbitrator cast his vote on equal parity with his colleagues?
c) Should the impartial arbitrator, or umpire, take no direct part in the proceeding except when called upon to decide a deadlock, and then cast the deciding vote?
d) If the other arbitrators are partisans, should the impartial umpire make a sole award, subject to such influence and persuasion as the partisan arbitrators may bring to bear?

As an example of the defects of this type of clause, take the agreement between the coal operators and mine workers. It provided:

> "Should the Board [two miners and two operators] be unable to agree on the selection of an umpire, he shall be designated by the International President of the United Mine Workers of America and the President of the Operators' Association affected. The decision of the umpire in any event shall be final."

Unfortunately, there was no "decision of the umpire" for the simple and almost inevitable reason that the two persons upon whom the ultimate choice rested never reached agreement. Result: The most disturbing and costly wartime strike.

Or, to see "human nature" at work, notice this from a recent letter:

> "During our attempt to agree on a man the union first stated that they would take "Professor Blank" and no one else. We do not know Professor Blank and had no objections to his service, but believed we should not agree with them on their choice stated in that manner. We offered four names, stating that we would accept any man they might choose from those four. They refused to do that also and left only the alternative of taking "Professor Blank" or no one. Our answer to that, of course, was 'no one.'"

To avoid such deadlocks, an impartial agency should be designated to appoint an impartial arbitrator if the "agreement to agree" fails to work.

5. WHEN BOARD CONSISTS OF EQUAL NUMBER OF APPOINTEES

Perhaps the height of inevitable frustration is reached under a provision that empowers each party to name an arbitrator (so-called) "the two to decide the issue." One wonders why two presumably intelligent men would sign such an agreement. They divest themselves of the right to negotiate, and pass it on to two outsiders—who must proceed to negotiate in their stead. This is certainly a "process"—but it lacks every one of the basic requirements of arbitration. A variation came recently to light where a so-called labor arbitration board was composed of 9 of the union's members and 9 members of the employers' association—and no impartial chairman.

6. MUTUAL SELECTION OF ARBITRATOR FROM IMPARTIAL PANEL

When the parties provide for selection of an impartial arbitrator, or board of arbitrators, from a panel such as that maintained by the American Arbitration Association, both the agency and the parties have certain obligations laid upon them. The Association does not, except upon the mutual, express requirement of the parties, arbitrarily name an arbitrator without their joint concurrence.

Instead, when the agreement calls for arbitration under the

Association's Rules, or it is designated to name the sole arbitrator, or the impartial chairman of a board of arbitrators, it submits simultaneously to each party identical lists of arbitrators having the qualifications demanded by the type of controversy to be determined, which qualifications are made known to the parties. Independently *and without consultation with the other,* each party strikes from this list the names of any individuals he might wish to veto for any reason whatsoever, thus leaving on the list only arbitrators satisfactory to him. He is instructed to number these in the order of preference. When the lists are returned the Association makes the choice of an impartial arbitrator, or board, as the case may be, from among those men whose names remain on both lists. The individual who stands highest in the preference of both parties is tendered the office of arbitrator. If he is unable to serve at the time designated, the office is tendered to the one having the next highest preference rating.

Perhaps the greatest single contribution the Association has made to the cause of voluntary labor arbitration is its invention of a method by which two parties who may not be "on speaking terms" can come to a satisfactory mutual choice of an impartial arbitrator without a single word of direct communication between each other.

Couple this with the availability of most of the best arbitrators in America who are members of its Panels and the provision of mutually satisfactory Rules under which arbitrators function in its Tribunals, and one understands why there was such a phenomenal growth during the war of the use of the Association's voluntary arbitration clauses and tribunals, and naturally the compulsory arbitration system set up by the Government under the War Labor Board.

Mention might be made here of a new type of arbitration provision that might be called the *"Last Man Up"* method. Among those who, through prior experience, have seen demonstrated the high quality of competence and the impartiality of the Association's Panel of Arbitrators, a modification of the standard practice is growing rapidly. This calls for the submission of, say, seven names. Each party may "veto" three. At least one name is thus left on both lists and is the mutual choice of the parties. The same principle can apply to lists of five, nine, or any odd number.

It will be noted that man's ingenuity in inventing many ways to do the same thing has led to some queer results. And perhaps no one method will ever satisfy all of the requirements.

But there are four tests to which every method should be subjected: Will it produce a sole arbitrator or a board—

1) that is impartial and competent;
2) that represents a high degree of mutual choice;
3) that can arrive at a fair decision without compromise; and
4) that can be appointed in spite of any neglect or refusal on the part of a recalcitrant party to the contract?

With this "yardstick" in mind, those responsible for drafting provisions for arbitration into collective bargaining agreements should give consideration to the may be called *Four Square Method.*

A tripartite board, with representatives of management and labor, and an impartial chairman, has much to commend it, in theory—and in practice, provided certain safeguards are established.

The first of such safeguards would seem to be that neither the management nor the labor arbitrator should have a direct interest in the particular case. Each should be chosen by some method which assures that they are not the special advocates of the particular parties involved in the dispute. They should be good representatives, however, of the respective viewpoints. The impartial chairman of such a board should, of course, be completely impartial.

Perhaps the most effective method of selecting such a board, so as to secure the highest degree of attainable impartiality, is by the parties calling for tripartite, odd-number lists of names from a responsible and impartial nominating agency. They then would each have the privilege of vetoing a minority of the names from each group. If five names from each group were submitted, each party might veto two, and number the remaining names in their order of preference. Failure to veto would be automatic approval. The arbitrator to be selected from each group would be the man of highest mutual preference.

In this way a high degree of choice is preserved and a board is created which reflects a true cross-section of viewpoint. Both labor and management could profitably develop this method into wider practice. It offers security against "deadlock" in the selection, gives a higher dignity to the labor and management repre-

sentatives and enlists a greater degree of effort on the part of all the members to find the true and just settlement.

Whatever method of selecting impartial arbitrators the parties elect to use, they should examine and study it carefully for any preventable loopholes, or weaknesses, or insufficient coverage.

Does it provide alternate methods, whereby deadlocks may be prevented if one method fails? Does it employ time limits to prevent lag in naming the arbitrator and getting the proceeding under way? Does it enlist the machinery of the best available sources for supplying arbitrators?

If the clause itself does not so provide in detail, does it invoke adequate rules of procedure that provide a method that safeguards the rights of both parties?

And does the clause preserve, to the fullest possible extent, the principle of voluntary arbitration which assures both parties the greatest possible opportunity to exercise *mutual choice* in their selection of the arbitrator and yet avoids the possibility of frustration of the agreement to arbitrate?

When an arbitrator is conscientious, painstaking, and fair in arriving at his decision, and bases that decision upon the proofs submitted; when he brings his competence, experience, and commonsense to bear impartially upon the issues before him; when he follows the procedure laid down in the parties' agreement, or in whatever rules of procedure they have adopted, so that each party knows he has had a fair trial—then arbitration commands confidence, and the award will be one that satisfies justice.

NEWS AND NOTES

Confusion on the Labor Front. As these notes are written, the Labor Management front is still confused and portentous of future difficulties. The Maritime strike is substantially over but a minor railway strike which might be the spark to set off a whole new chain of transportation disputes is in the offing—postponed so that a fact-finding board may have another 30 days to pursue an elusive settlement. The New York truck strike has been partially won by the Union but management for the major part is still holding out. The discharge of one auto worker fuses a walk-out in a key parts plant and 50,000 men are laid off while new car deliveries are still so scarce that black market

premiums of fantastic proportions are reported to be common practice. Western Union employees file 30 strike notices. Jurisdictional flare-ups occur frequently and numerous labor leaders are serving public notice of wage demands to equalize the spiraling cost of living increases which have occurred since the last readjustments.

New Styles. Eric Johnston raises his voice in advocacy of the rule of reason in settling labor disputes. Mr. Johnston who is now President of the Motion Picture Association of America and past President of the Chamber of Commerce of the U.S.A., recently addressed the Convention of the International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators, on the subject "Utopia is Production." He said:

> "We can set new styles in thinking. We can set new styles in living. And two new styles need setting now. The doctrine of production must be made completely popular. It must become the style. The doctrine of arbitration—give and take—must be accepted as the natural, normal thing to do. It must become the style. These two things lead to security; they lead to higher living standards; they lead to higher moral standards. These things spell Utopia as you and I conceive Utopia to be."

Actors' Equity Again Takes the Lead. And from the other side comes an eloquent appeal to its brother unions in the A.F.L. from the Actors' Equity to settle their jurisdictional disputes through the use of arbitration. Citing its own 20 years of experience in entrusting the settlement of its disputes to the American Arbitration Association, Equity said it "has learned that in arbitrations as conducted by that organization, intimate knowledge of technical details is less important than complete impartiality and a desire to achieve strict justice in its awards."

Other Bright Lights Are Not Lacking on the Horizon. The United Steelworkers Union has instituted an intensive course of training for their field representatives in which is included a definitive exposition of the uses of voluntary arbitration. . . . . The Bureau of Labor Statistics publishes an analysis of collective bargaining agreements revealing that over 70% include provisions for the arbitration of disputes that arise under the contract. . . . . The International Labour Office records strong resolutions passed at the recent Mexico City meeting in favor

of voluntary arbitration and in its August 1st report, advances the same proposition regarding labor disputes arising in non-self-governing territories. . . . . The Toledo plan of a local tripartite conciliation agency takes hold in several other communities in Missouri and California. . . . . Mayor O'Dwyer of New York City establishes a Labor Relations Division in his own office, with Theodore Kheel (past Executive Director of the WLB) associated in its administration with Edward Maguire. . . . . And the use of the American Arbitration Association's Voluntary Labor Tribunals grows apace throughout the country, with many new converts among both corporations and unions.

Publication of Awards. Interest in the substance and reasoning of arbitration awards has encouraged the establishment of two reporting services—the first under the ægis of the Bureau of National Affairs in Washington, and the other under Prentice-Hall of New York. The American Arbitration Association continues its original policy of respecting the confidential character of cases and awards in its Tribunals and releases data regarding them only upon explicit authorization from both parties.

Postwar Policies in Appointing Arbitrators. The U. S. Conciliation Service announces that as of September 1st, arbitrations over the basic terms of new contracts in which the Service is designated to act as administrator will necessarily involve the assumption of some responsibility by the parties in the selection of the arbitrator.

Director Warren underlines that the Service will continue to appoint arbitrators in its own discretion where the dispute arises over the interpretation or application of an existing contract.

The American Arbitration Association continues its basic policy of *always* endeavoring to get the parties to come to agreement upon the arbitrator—irrespective of the character of the dispute to be arbitrated. Its panels, carefully built up during 20 years, make it feasible to provide lists to the parties from which mutually agreeable selection is almost always possible.

New Problems Arise Out of the Right of Foremen to Organize. The Circuit Court's upholding of the National Labor Relations Board's decision in the Packard case regarding the rights of

foremen to organize and bargain collectively produces new problems for arbitration. On the principle that foremen are part of management, it would seem that management may now have to arbitrate with itself over disputes that arise between the various levels of supervision and policy management. Furthermore, a new area of triangular dispute is opened up, where two levels of management—one unionized—may be in diversified dispute with the unionized working force. Expert handling of the arbitration problems involved in labor relations daily becomes more important to both management and labor.

New Limitations on the Scope of "Management Prerogative" Clauses. The National Labor Relations Board establishes new limits to the scope of "management prerogative" clauses in the Timken Roller Bearing Company case. If the day-to-day working conditions of the employees are affected by decisions taken unilaterally by management, the presence of the typical prerogative clause will not forestall the right of the Union to require negotiation of the issue. This means that if negotiation fails to settle the dispute, the arbitration clause gains even greater importance than when management assumed that the prerogative clause would be fully effective.

The Pennsylvania Bar Association Has Instituted a Special Labor Section. Under the Chairmanship of Col. Wm. Culbertson, this section will hold its inaugural session in January 1947. Paul Fitzpatrick, Administrative Vice President of the American Arbitration Association, will deliver an address on Labor-Management Arbitration.

ANTONIO SANCHEZ DE BUSTAMANTE

DR. RICARDO J. ALFARO *

SELDOM, if ever, does the name of an outstanding internationalist reach the general public. People are more immediately concerned with political glamour. However, the name of Antonio Sanchez de Bustamante is in my country a happy exception to this statement. While his prestige as a jurist is universal, his memory lies deep in the conscience of Panama. His name is revered by great and small alike, because it recalls to the national mind the unfortunate year of 1921, when the Republics of Panama and Costa Rica fell apart, as the saying goes, on a matter of arbitration, now definitely settled for the sake of peace and good will. On that particular occasion, Dr. Bustamante was invited to study both sides of the case. After examining the problems involved, in a manner which was both brilliant and thorough, he gave his considered opinion, which happened to uphold the views maintained by the Government of Panama. Our contention was that Chief Justice White had gone, as arbitrator, beyond his authority in the case, and had, as a consequence, made an award vitiated by *ultra petita.* In supporting the views of Panama, Dr. Sanchez de Bustamante actually contributed to save the very principle of arbitration, for if arbitration is bound to prosper and grow in importance among the nations of the world when applied in accordance with its governing principles, it may also be utterly discredited if handled precariously.

Traditionally the people of Panama are devoted to the principles of arbitration and conciliation. Such, it may be inferred, is always the leaning of all small nations, since it is only on the grounds of justice and right that they can ever hope to settle successfully whatever differences might arise with more powerful neighbors. It should be borne in mind that historically the principle of multilateral arbitration was for the first time proposed and proclaimed in our Continent in the American Congress of 1826, convened by Bolivar and held in Panama. Indeed, the political turmoils of that era prevented the ratification of such high principles of international society, for most

* Member, Permanent Court of International Arbitration, for Republic of Panama.

of our States had not yet defined either their physical or their moral characters. Still, the mere proclamation of such standards of international life do tower among the achievements of our Continent. Little if any progress was attained in this direction during the numerous meetings and conferences which were held afterwards. When Antonio Sanchez de Bustamante presided at the Conference of Havana in 1928, over a century later, the American nations found themselves still at the stage of optional arbitration. The fact is worthy of note. Progress in the direction of obligatory arbitration and conciliation in America dates back from the Sixth International Conference of American States, which took place in Havana in 1928.

Because of his many accomplishments in the field of international law and his personal qualities of forbearance and equanimity, Antonio Sanchez de Bustamante was to a high degree responsible for the agreement on compulsory arbitration, which was reached in Havana that year. Reasons of expediency suggested, however, a different time and another place to give to it its permanent form. Thus, a treaty was concerted and signed in Washington in 1929. The principle of compulsory arbitration draws so much favor nowadays, that the main criticism to that treaty is based on the grounds that it narrows down to a fine point the subject matter of compulsory arbitration. The contention is unfounded. Indeed, the treaty limits its scope to justiciable matters, namely, those questions that may be decided by the application of the principles of law. They are classified as follows: a) interpretation of existing treaties; b) any point of international law; c) any fact which, if ascertained, might constitute a violation of international law; and d) the nature and extension of any reparation arising from violations of international law. The charge is made that the treaty does not take into account political questions, which may form the bulk of the problems. As I have pointed out on several occasions, a line must be drawn between *political matters* as such, and *questions arising from political actions.* The latter may easily fall into differences the nature of which may be properly termed justiciable. The criterion should be determined whether a given political action is likely to disturb in another nation, either directly or through indirect consequences, conditions that are protected by the principles of international law. It is obvious that such matters then would fall within the scope of the treaty.

The crux of the problem lies somewhere else. It is not always easy or practical to have the interested States agree on the issue of whether the controversy is or is not a proper subject of arbitration. As a partial approach to the solution of this difficulty, which has many angles, a protocol on progessive arbitration was also signed in Washington in 1929. A very substantial contribution to the cause of peaceful settlement may come from the establishment of the International Court of Justice, as agreed in the Charter of San Francisco, for it should act as the judicial power of that multi-State organization known as the United Nations.

The Sixth Conference of Havana was a rather sensational meeting. Great debaters took the floor on the matter of intervention. Bitterness and suspicion filled most minds. Yet, its administrative and legal contributions to the cause of Pan-Americanism far surpassed all those of preceding conferences put together. The codification of International Law for America was effectively enhanced by the adoption of a Code of Private International Law, which happily solves many of the vital problems of the Conflict of Laws. It is officially known as the *Bustamante Code,* as the nations of our continent were unanimous in their wish to render such a glowing tribute to its eminent author. Additional work for the structure of a codified International Law (Public) was also laid through the adoption of eight agreements on such matters as public treaties, diplomatic officials, consular agents, asylum, neutrality, status of aliens, rights and duties of States in case of civil war.

Dr. Bustamante's bibliography is enormous. His contributions range from *The Panama Canal and International Law,* published in Brussels in 1895, to *Unlawful Aggression and Defense,* published in New Orleans in 1942. Some of his works have been translated simultaneously into different languages the very year they were edited in their original Spanish. Such was the case of *El Mar Territorial,* published in Havana in 1930; and translated that very year in French as *La Mer Territoriale* (Paris) in German, as *Das Territorialmer* (Berlin) and in English as *The Territorial Sea* (New York). Dr. Bustamante's life is an inspiration to his students as well as to his friends; and it will remain, because of his work, a lasting glory for Cuba and America, a source of perennially renewed faith in the cause of international arbitration.

ARBITRATION LAW AND PRACTICE IN SWEDEN

HAKAN NIAL*

A. DOMESTIC ARBITRATION

I. Law. Swedish arbitration is regulated by the arbitration law of June 14, 1929 (Lag om Skiljemaen), by which the former law of 1887 has been revised.

1. *Arbitration Agreement.* An arbitration agreement may be concluded not only for commercial but also for other civil disputes, including those arising out of tort, provided that they may be the subject of disposition by the parties. The only exceptions are certain types of collective bargaining disputes and rental disputes. No special form is prescribed for the agreement, which may refer to an existing dispute or to future controversies arising out of a specific relationship of the parties. An arbitration clause in a contract is, therefore, valid, as are arbitration clauses in by-laws of associations or legal entities.

The effect of an arbitration agreement is that a party thereto cannot have the dispute decided by the court against the will of the other party. Under Swedish law, there does not exist the possibility of revoking the arbitration agreement, as may be done in some of the states of the United States of America until the award has been rendered. If, however, a party objects to the demand for arbitration by the other party and does not carry out its obligation to nominate an arbitrator, the other party may proceed in court if it so prefers.

If, in their agreement, the parties have preserved the right to appeal from the award to the ordinary court or to an appeal arbitral board, which rarely happens, the law of June 14, 1929, does not apply.

2. *Arbitrators.* Through detailed provisions, the law tries to overcome the weakest point in arbitration proceedings: the lack of authority and impartiality of the arbitrators. Besides several specifically mentioned reasons for challenge—one of which occurs

* Professor at the University of Stockholm, with the collaboration of Dr. jur. Arne Georg Cohn, p. t. Stockholm.

when an arbitrator, as an attorney of the party, has aided a party in preparation of the case or in its legal prosecution—any circumstance deemed to have undermined the confidence of a party in the impartiality of an arbitrator is reason for challenge. The arbitral board itself decides whether a challenge presented is justified. The unjustifiable denial of a challenge, however, provides one of the grounds upon which an award may be vacated by judgment. (See below, No. 5.) If a party has participated in a proceeding without challenge or if a waiver of challenge may be assumed, such party cannot ask for the vacation of the award at a later date.

The parties themselves may determine how many persons shall constitute the tribunal and who shall be the arbitrator. Unless otherwise agreed by the parties, the tribunal consists of three persons, of which each party nominates one and the two so named select the third. If a party refuses or fails to appoint an arbitrator, or if an arbitrator selected by a party refuses to assist in the selection of the third arbitrator, the right to appoint will be exercised by an execution authority (*overexekutor*).

A vacancy in the office of arbitrator, by death, refusal to act or any other reason, amounts to the invalidation of the arbitration agreement if the arbitrator has been named in the agreement and the parties have not provided for the selection of a successor. If the naming of a successor is provided for, the selection is made by the person or persons who named the original arbitrator. A successor will, however, be appointed by the competent *oxerexekutor* if the vacancy arose by reasons other than death, challenge, or refusal to act after designation, thus precluding the possibility of obstruction.

3. *Arbitration Proceeding.* The law gives the parties and arbitrators wide latitude in regulating the procedure. Compulsory provisions, therefore, exist only in a restrictive degree. An arbitration proceeding may not be initiated in a case still pending in court or against a respondent not residing in Sweden. In the latter case, even a Swedish court would not be competent unless the foreign party expressly agreed in the contract or otherwise to an arbitration proceeding in Sweden. The arbitral tribunal has no authority to impose fines or to administer oaths.

Witnesses and experts may, however, be heard by the court on application of the parties. The parties must have opportunity to present their case orally and by briefs, if necessary for the

determination. The arbitral tribunal is obliged to deal with the dispute impartially, appropriately and speedily. The speed of a procedure is guaranteed by the provision that the arbitration agreement lapses if the controversy has not been decided within a time limit of six months, unless the parties otherwise agree and provide for. This time limit, however, may be extended for an additional six months by the competent *overexekutor.*

The statute is silent as to the question whether the tribunal is obliged to decide a dispute according to the law. In general, however, it may be stated that while the arbitrators need not be lawyers, they are required to follow the law in principle. Within this framework, however, they have wide latitude for the application of equity viewpoints.

4. *Award.* The law provides for a written award, signed by the arbitrator. The award need not state the arbitrator's reasons for arriving at his decision. It must be delivered to the parties (deposit with the court or other office is not provided for). The arbitrators are not allowed to withhold the award until the payment of their fees.

5. *Remedies.* An award cannot be appealed on the merits. If the parties have reserved in the contract the right of appeal, the result is not an award within the meaning of the statute (see above, No. 1). Formal deficiencies may, however, affect the validity of an award, either to the extent that it is automatically invalid, *ipso jure* void, or may be vacated by judgment if a party so moves within certain time limits.

Ipso jure reasons for invalidity are: a) the contract is invalid; b) the arbitral tribunal decided a dispute which cannot be the object of an arbitration clause; c) the award has been rendered in spite of pending court action; d) the award has not been rendered in writing or had not been signed by the arbitrators. The award, however, is valid in spite of the lack of signature of an arbitrator, if the majority of the arbitrators sign and affirm in the award that the arbitrator whose signature is lacking has participated in the proceedings.

Restricted reasons for invalidation are: a) the arbitrators have overstepped their authority or failed to render their award within the required time limit; b) the arbitration proceeding did not comply with the requirements of Swedish law; c) an arbitrator was partial or improperly selected; d) the outcome of the

case has been influenced by any deficiency or irregularity, committed in the proceeding without fault of the parties.

A party cannot avail itself of the aforementioned reasons for invalidation if it has waived them expressly or implicitly, as by participating in the arbitration proceedings without objection. There is a time limit of sixty days for initiating a motion to vacate the award.

6. *Fees of the Arbitrators.* The arbitrators may, unless otherwise provided for by the parties, determine the amount of their fees in the award, and charge the parties with the payment. The parties, however, may appeal from this part of the award to the court within a time limit of sixty days.

7. *Exequator.* A party who desires to execute an award must apply to the competent *overexekutor* for an exequatur. The other party has a right to be heard. The exequator will be given unless, in the opinion of the *overexekutor,* the award is *ipso jure* invalid or the other party asserts a reason for vacation. The exequator may be refuted when, in the opinion of the *overexekutor,* the award lacks the clarity necessary for the giving of an exequator. In such case, the parties can proceed in ordinary court in spite of the award.

An arbitrator can also ask for an exequator from the *overexekutor* for the amount of fees awarded to himself, but only after it has been established that the party did not make an appeal within the time provided for.

II. Practice. Though an arbitration agreement may be made for an existing dispute, generally such agreements refer to future disputes. Arbitration clauses are also often used in by-laws of associations or other legal entities, thus assuring a more speedy adjudication of a case than can be obtained in court procedures, which may take extensive time in Sweden. (A speedup of lawsuits is expected to result from the recently enacted, extensive reform of court procedures in Sweden.) Another reason for the use of clauses is avoidance of publicity related to court suits, particularly in price conventions and cartel contracts.

Instead of appointing arbitrators in the manner provided for in the statute, the parties may apply to permanent arbitral tribunals as they exist in several of the twelve Swedish Chambers of Commerce. Important also is the Swedish Arbitral Board for Trade in Grains and Feedstuffs (*Sveriges Skiljenamnd for*

Spannmals-och Foderamneshandeln) in Stockholm. This tribunal consists of thirty members selected by the Chamber of Commerce in Stockholm. The dispute will be decided by three members selected by the tribunal. In case they do not agree, the number of arbitrators is increased to five and the dispute will be decided by majority. In disputes arising out of a foreign contract which provides for an arbitral appeal board, appeal may be taken to one of the appeal arbitral boards pursuant to the rules of the arbitral tribunal. In that case, the law of June 14, 1929, is not applicable.

Another arbitral organization is the Swedish Technical Industrial Institute of Arbitration (*Sveriges Tekniskt-Industriella Skiljedomsinstitut*), in Stockholm, whose function it is to assist in arbitral proceedings for the settlement of civil disputes on technical and industrial questions, including those arising in the building trade. Arbitrators appointed for the settlement of such disputes are not affiliated with the Institute. Generally three persons constitute the arbitral board; at least the chairman shall be a lawyer. By agreement of the parties, the number of arbitrators may be restricted to one person or increased to five persons. In the latter case, each party appoints one arbitrator.

B. FOREIGN ARBITRATION AND ITS EFFECT IN SWEDEN

1. Law. After its adherence to the Geneva Protocol of 1923 and the Convention of 1927, Sweden enacted a law on foreign arbitration agreements and awards of June 14, 1929 (*Lag om Utlaendska Skiljeavtal och Skiljedomar*).

Whereas the exequatur for foreign judgments will be given in Sweden only pursuant to special treaties as they exist with the four other Nordic countries—Denmark, Finland, Iceland and Norway—and with Switzerland, foreign arbitral awards may be declared executable without review of the merits, although contrary to judgments, they have their basis in a voluntary and private contract. The law confirms and clarifies only the existing situation.

The law of 1929 did not confine itself to applying the principles embodied in the Geneva Protocol and Convention, but goes farther in several directions: it defines the term "foreign arbitration agreement"; it answers the question of the proper law of the arbitration contract and recognizes foreign awards without regard to reciprocity and whether the parties are subject to the

jurisdiction of a signatory state. Moreover, the Swedish legislature did not avail itself of the full extent of the right conceded to the signatory powers to the Geneva Convention, namely, to investigate, *ex officio*, certain questions in the exequator proceedings; nor is the application of the law restricted to commercial disputes. The content of the law is briefly the following:

1. *Foreign Arbitral Agreement.* An arbitral agreement is considered as foreign when it answers in the affirmative the question whether the procedure shall be held outside of Sweden or, if this question has not been answered, when the agreement is concluded by persons who reside outside of Sweden.

Whereas the law, with this definition, distinguishes only between foreign and domestic arbitration agreements, it does determine the foreign law applicable to the arbitration agreement. The arbitration agreement which provides for proceedings in a foreign country is subject to the law of that country as the proper law of the arbitration contract.

A foreign arbitration agreement bars a lawsuit in Sweden whenever a party refers to it in objecting to the court procedure, provided that the arbitration agreement is valid under the proper law and, further, that pursuant to Swedish law the dispute may be the subject of an arbitration agreement. Proceedings based on foreign arbitration agreements generally do not take place in Sweden, except when the arbitration agreement does not provide whether the proceeding shall take place in Sweden or outside of Sweden, and the agreement is thus considered a foreign one because of its being concluded by parties resident outside of Sweden and the party against whom the arbitration agreement is invoked has taken residence in Sweden after conclusion of the agreement.

2. *Remedies in Sweden.* As is the case in Swedish arbitration proceedings, witnesses and experts in a foreign arbitration may be heard by Swedish courts.

3. *Foreign Award.* An award is considered foreign when it has been rendered abroad; it is generally recognized in Sweden. It may not only be executed in Sweden but, in determining the relationship between the parties as binding, amounts to a bar to any new lawsuit for a judgment in an ordinary law court.

A foreign award will not be recognized in Sweden:

a) if the arbitration agreement is void under the applicable law of contract;

b) if the award has been vacated in the country where rendered, or is void without invalidation proceedings, or is the object of a lawsuit or is not yet final;
c) if the award refers to a dispute which cannot be the object of an arbitration under Swedish law or differs from a decision of a Swedish court or *overexekutor* rendered in the same matter after the conclusion of the arbitration agreement;
d) if the other party has not had sufficient opportunity for presenting its case;
e) if there is any circumstance with regard to the arbitration proceeding or the award which would indicate that the recognition of the award would conflict with the public order.

Not all of these reasons are taken into consideration *ex officio*. An objection of the party is necessary whenever the court is requested to take into consideration that an award, not being vacated in the country of its origin, is void without invalidation procedure or that the losing party was not given sufficient opportunity to present its case.

4. *Exequatur*. The motion to enforce the award must be filed with the Svea Hovraett in Stockholm, one of the four appeal courts. Unless it is in conflict with the provisions of No. 3 above, the exequator is given after the other party has been heard. Appeal from the decision rendered in the exequatur proceedings lies to the Hoegsta Domstolen, the Swedish Supreme Court.

II. Practice. The practical importance of foreign arbitration agreements and awards for Sweden cannot be measured by their number. The enforcement of foreign awards occurred, even in peace time, only in a small number of cases and decreased still further after the beginning of the European War in 1939. This does not mean, however, that foreign arbitration agreements and awards are of minor importance in Sweden. Few arbitration clauses lead to arbitration proceedings, and in nearly every case awards are voluntarily complied with.

One of the cases in which the enforcement of an award was considered concerned a Dutch seller and a Swedish buyer who had agreed upon the sales price in Swedish currency. When Sweden went off the gold standard and the value of Swedish currency decreased in relationship to the Dutch guilder, the

seller asked for payment on the basis of the gold value and annulled the contract when the buyer refused. The latter thereupon asked for damages for non-compliance and obtained an award in his favor in Holland. In the proceedings of exequatur, the buyer contended that the recognition of the Dutch award would be against the Swedish public policy, as it would not be in conformity with the nominal currency-principle prevailing both in Holland and in Sweden. The Court of Appeals, however, enforced the award and the Swedish Supreme Court affirmed this decision.

REVIEW OF COURT DECISIONS *

CIVIL

Allowance to Divorcee Not Always an Arbitrable Issue. A separation agreement provided for allowances which should be fixed by arbitration if the parties could not agree on the amount to be paid after a period of a year. The decision of Special Term [1] directing the husband to proceed to arbitration was reversed on the ground that in New York actions will not lie for maintenance and support, inasmuch as courts have jurisdiction to make such allowances only as an incident to an action for divorce or separation. As the dispute on the amount that the husband should pay could not be made "the subject of an action" (Sec. 1448 C.P.A.), the issue was not considered arbitrable. The court further held that the amendment to the statute of 1941 (Laws of 1941, Chapter 288), authorizing arbitration of "questions arising out of valuations, appraisals, or other controversies which may be collateral, incidental, precedent or subsequent to any other issue between the parties" does not authorize the submission of a controversy which may not be the subject of an action.[2] *Robinson v. Robinson,* 62 N.Y.S. 2d 785; motion for reargument denied, 63 N.Y.S. 2d 831.

Expiration of Arbitration Agreement by Its Own Terms. Under a provision in a lease for the period of twenty years, the annual rent was to be determined by an award of arbitrators to be rendered not later than October 1, 1945. Arbitration, however, was not initiated by the landlord until October 22, 1945. Notwithstanding this express provision, Special Term relied upon the provisions of Sec. 1452 C.P.A. to justify the appointment of arbitrators.[3] The decision was reversed by the Appellate Division which held: "when the parties have specified that arbitration must be instituted prior to a given date, it is presumed that the parties intended to be bound by the provision and that the particular date mentioned is an essential part of the contract. Where, as here, the parties have agreed upon certain critical dates and they have passed and the failure to make use of the procedure prior to those dates is not explained, it is manifest that section 1452 has no application." *Broadway-40th Street Corporation v. Manhattan Company,* 271 App. Div. 219, 62 N.Y.S. 2d 888.

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* Full text of the decisions and further information is available upon request to the American Arbitration Association.

[1] 61 N.Y.S. 2d 859, digested in *The Arbitration Journal,* p. 83.

[2] The court did not consider a decision to the contrary in *Luttinger v. Luttinger,* N.Y.L.J., June 24, 1944, p. 2435; aff'd 268 App. Div. 1052, 52 N.Y.S. 2d 931; aff'd 294 N.Y. 855, 62 N. E. 2d 487. See note in *Columbia Law Review,* September 1946, p. 841.

[3] 60 N.Y.S. 2d 725, digested in *The Arbitration Journal,* p. 87.

Awards Must be Signed by Majority of Arbitrators and When Vacated Cannot be Resubmitted to New Arbitrators Without Authorization. In a dispute regarding the employment of teachers, an award by three arbitrators was signed by only one arbitrator and not acknowledged. Under the prevailing law, an award must be "subscribed by the arbitrators making it," and "acknowledged in like manner as a deed to be recorded" (Sec. 1460 C.P.A.); but an award by a majority of the arbitrators is valid "unless the concurrence of all is expressly required in the submission or contract" (Sec. 1456 C.P.A.). The court held that "an unacknowledged award can be corrected before decision upon a motion to confirm (*In re Herman*, 170 Misc. 852; *In re Verly Bldg. Co.*, 264 App. Div. 885). However, here there was also failure to sign or subscribe the award." The court further denied a motion to resubmit the matter not to the same arbitrators, since there is no authority for the court to submit the matter to new arbitrators. *Kluger v. Plevko*, N.Y.L.J., August 15, 1946, p. 271; September 13, 1946, p. 453; Dickstein, J.

Correction of Evident Miscalculation of Figures in Award may be Exercised by the Court. Three arbitrators unanimously sustained a contract between parties but evidently failed to calculate an amount due for the continuance of the play "Polonaise" for additional weeks between the date of initiation of arbitration and the date of the award. Under Sec. 1462(a) Subdiv. 1 C.P.A., the court is permitted to modify or correct the award in the event of "an evident miscalculation of figures." As the arbitrators had become *functus officio*, they could not be asked to correct the award, and the duty was therefore imposed on the court which granted the relief in order not "to stultify the administration of justice." *Sherman v. Bloomfield*, N.Y.L.J., August 30, 1946, p. 361; Greenberg, J.

Certainty of Award Under Common Law Arbitration in Massachusetts. Parties submitted to common law arbitration matters in dispute on two promissory notes for $25,000 signed by both parties, and for $45,000 signed by the claimant alone. The arbitrator stated in his award that in his opinion both notes were given for the accommodation of the defendant, and that the plaintiff "should be repaid for whatever he has paid" on these notes. There was no finding as to how much the plaintiff has paid on the notes or how much the defendant owes the plaintiff in respect to them. The award was not considered sufficient as a common law award since the arbitrator did not make a finding of the sum actually due on account of the notes, though the ascertainment of the amount was within the scope of the submission. This decision of the trial judge was confirmed by the Supreme Judicial Court of Massachusetts which said: "We regard it as settled in this Commonwealth by *Fletcher v. Webster*, 5 Allen 566, that where the ascertainment of an amount due is within the scope of a submission, an award for the payment of money which does not state the amount to be paid and does not in itself afford any means by which that amount can be made certain is invalid." *Baldwin v. Moses*, 1946 Advance Sheets 445, 66 N. E. 2d 24.

Award Subject to a Withholding Tax. The confirmation of an award was not objected to but the respondent presented the question as to whether taxes should be withheld from the award. Pending such determination by the Federal tax authorities, the respondent was directed by the court to "pay over the amount of the award less withholding tax to be held by him until further order of the court." *Gershon v. Budget Shops, Inc.*, N.Y.L.J., August 16, 1946, p. 281; Dickstein, J.

COMMERCIAL

Foreign Government Agency Submits to Arbitration. A contract between the National Resources Commission of China, an agency of the National Government of China, and a consulting industrial engineer provided that "in case of any disputes concerning the terms and conditions of this contract, the decision of the Commission's Project Representative shall be binding. In the event that the Consultant should refuse to accept the decision of the Commission's Project Representative, the appropriate procedures of the American Arbitration Association shall prevail." The claimant attached funds of the Commission which latter appeared in court to vacate and annul the warrant of attachment on the ground that as an agency of a foreign sovereign, it was immune from suit. The question arose whether the reference to arbitration in the contract amounts to a waiver of the claim of sovereign immunity and thus to a consent in fact to be sued in court. The court proceeding, however, was stayed and the plaintiff directed to submit his claim to arbitration. *Peter B. Payne, Inc. v. Nat. Government of the Republic of China*, N.Y.L.J., August 23, 1946, p. 321, Aurelio, J.; August 30, 1946, p. 361, Greenberg, J.

Bookkeeper Without Authority to Make Arbitration Agreement. A rug cleaner's driver collected rugs from a rug dealer for cleaning and gave a receipt captioned "Customer's Contract" to the dealer's bookkeeper; this receipt contained a clause providing for arbitration and was initialed by the bookkeeper. The court, however, held that no valid arbitration agreement had been concluded by the parties because the document "was intended to be effective as a receipt only, in the ordinary sense in which a subordinate employee of a small commercial concern would understand that word." The court further mentioned that the arbitration clause printed in 8-point type was not brought to the respondent's attention and that there was no reason to suspect its existence. Said the court: "An agreement to arbitrate should not be imposed on a party lightly, and by virtue of a consent which rests upon a bold and unrealistic presumption rather than upon actuality." Thus, an application to compel arbitration under Sec. 1450 C.P.A. was denied for the reason that the person signing on behalf of the respondent had no authority to make a contract for arbitration, and, further, that the instrument in question did not constitute a contract to submit differences to arbitration. *Gold v. A. Broido, Inc.*, 185 Misc. 1039.

No Stay of Arbitration Because of Claim Against Additional Defendant. Plaintiff may not avoid the obligation to arbitrate his claim against the cor-

poration by pleading a separate cause of action for a part of the claim against an additional defendant. A motion to stay an action, pending arbitration, was therefore granted. *Estate of Leon Rubin v. Beth Jacob School of West Bronx, Inc.*, N.Y.L.J., April 4, 1946, p. 1325; Dineen, J.

Arbitration of a Counterclaim. The assertion of an unrelated counterclaim which is subject to an arbitration clause does not entitle the defendant to the stay of a trial where the only issue involved is the exact amount due for goods sold and delivered to him. *Frank Miller Lumber Co. v. Hatfield*, N.Y.L.J., May 14, 1946, p. 1913 (Appellate Division, Second Department).

Fairness of Arbitrator's Adjudication of Damages May not be Questioned in Court. In a controversy arising out of a sales contract, the arbitrators awarded the buyer a sum of $1,500 as damages instead of $9,909, the amount claimed. The arbitrators gave no explanation of their reasoning in the award. On a motion to vacate the award the court increased the damages assessed against the seller to the sum claimed by the buyer because the granting of any damages by the arbitrators implied that there was a breach of contract. Said the court:[1] "It is apparent that the award of the arbitrators is either a compromise or was an evident miscalculation of the damages." On appeal by the seller the judgment of the Special Term was reversed "upon questions of law," and this judgment was affirmed by the Court of Appeals with the following holding: "The stipulation for arbitration was in this form: 'All controversies arising out of or relating to the contract, or any modification thereof, shall be settled by arbitration in accordance with the Arbitration Rules of The National Federation of Textiles, Inc., or its successors.' The rules of that federation made these provisions: 'The award may . . . . declare a contract breached in whole or in part; and/or award money damages in the alternative or otherwise; but the foregoing shall not limit the power of the arbitrators to grant any other remedy or relief which they deem just and equitable.' Thus the authority of the arbitrators was not limited (as the buyer claimed) to an adjudication of a breach of the contract by the seller; it empowered them to assess the damages as well (*Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284). Nor is there any substantial ground for the buyer's assertion of an 'evident miscalculation of figures' such as would justify a modification of the award pursuant to Civil Practice Act, section 1462-a, subdivision 1. The amount of the buyer's damages was unliquidated and was disputed before the arbitrators. There was no error of computation unrelated to any exercise of judgment or discretion. The fairness of the arbitrators is not questioned. The award, as we believe, did not fail to give effect to their intent. In these circumstances, it is not for us to sit in judgment upon their settlement of the controversy." *Morris White Fashions, Inc. v. Susquehanna Mills, Inc.*, 295 N.Y. 450, 68 N.E. 2d 437.

No Court Review of the Merits of Awards. A partnership agreement provided for arbitration in order "to resolve and determine any disputes,

[1] N.Y.L.J., April 5, 1945, p. 1288; Eder, J.

claims, grievances or differences arising out of or relating to the said partnership venture." A motion to vacate an award was denied by the court in saying: "The merits however were resolved by the arbitrator; such determination, indeed, was the purpose of the arbitration. The court is powerless to review the merits or to upset the award upon any grounds not specified by the Statute (Sec. 1462, C.P.A.)." *Gruber v. Shuman*, N.Y.L.J., February 14, 1945, Collins, J.; aff'd 60 N.Y.S. 2d 284.

Unauthorized Private Inquiry of Arbitrator Leads to Vacating of Award. An arbitrator inquired by phone in the presence of two other arbitrators about the valuation of motion picture rights. The award of the arbitrators was vacated on the ground that "the private inquiry made by the third arbitrator after the submission of the case related to the important element of damages. Although it is now asserted that the information so secured did not enter into their decision, the very securing of such information without an opportunity for the parties to meet and test it in the course of regular proceedings impairs the award. Undoubtedly the arbitrator acted in good faith, but the irregularity is not trifling (*Berizzi v. Krauss*, 239 N.Y. 315)." *Kummer v. Bloomfield*, N.Y.L.J., May 2, 1945, p. 1669, Peck, J.; aff'd 270 App. Div. 884, 61 N.Y.S. 2d 922.

Jurisdictions of New York Court for Entry of Judgment upon Award Against Foreign Corporation. A contract between an American and a Canadian corporation provided that "differences, if any, to be settled by arbitration in accordance with the Rules of the American Spice Trade Association, New York." Neither the contract nor the (then existing) Rules of that Association, conferred upon New York courts jurisdiction *in personam* of the Canadian corporation. A judgment confirming the award (49 N.Y.S. 2d 456), was reversed for the reason that "personal jurisdiction must first be obtained before judgment may be entered against him [the judgment debtor] upon the award" (269 App. Div. 632, 58 N.Y.S. 2d 143). An appeal was dismissed "upon the ground that the order does not finally determine a special proceeding within the meaning of the Constitution." *Red Line Commercial Co., Inc. v. The Pastene Company, Limited*, 295 N.Y. 832, 66 N. E. 2d 850.

LABOR—MANAGEMENT

Questions of Amendment to Continuing Contract an Arbitrable Issue. A collective bargaining agreement provided that the company agrees to "meet and treat with" the union officers "upon all questions relating to hours, wages and working conditions, and should any difference arise between them which cannot be mutually adjusted, the same shall be submitted at the request of either party to a Board of Arbitration." After the company had served notice of termination of the agreement, the question arose whether when negotiation on changes and modifications fail, the parties are bound by the arbitration provisions. The Federal District Court, D. Minnesota held that questions of amendment to the continuing contract if they pertained to hours, wages or working conditions were arbitrable, against the

employer's contention that arbitration was limited to grievances or questions arising under the administration of the contract. Said the court: "There are no such limitations in the contractual language and in any event it would seem that questions of amendment of a continuing contract are questions arising under the contract and if they pertain to hours, wages and working conditions are arbitrable if a 'difference' arises between the parties which cannot be resolved by negotiation." *Northland Greyhound Lines, Inc., v. Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America, Division 1150,* 66 F. Supp. 431.

Restricted Authority of Arbitrator to Dispose of Discharge Issue. A dispute between a corporation and a sales department manager was sumitted to arbitration by the union after the manager had become a member of the union. The arbitrator sustained two of the charges of the employer, namely the failure to control excessive lateness among employees and the failure to have a furniture salesman stationed at the front of the store to be available to prospective customers immediately upon their entering the store. The arbitrator held that the management had the right to insist that its sales manager enforce its policy with respect to sales procedure and that "wilful refusal, or for that matter, inability on the part of its sales manager to enforce this policy after due warning should, in the opinion of the arbitrator, be deemed sufficient cause for discharge." After reaching this conclusion, the arbitrator disposed of the issue by giving the employee a "warning" and by permitting him to institute the sales policy within a time of two weeks from the date of the award. The award was modified by the court in providing that the discharge was justified. Said the court: "It is needless to point out that the arbitrator had no authority to make such disposition of the matter and, having found the employee guilty of the charge, he should have reached the only legal conclusion possible, that is, that the employer had the right to discharge the employee." *Modernage Furniture Co. v. Retail Furniture and Floor Covering Employees Union, Local 853,* N.Y.L.J., August 5, 1946, p. 207; Dickstein, J.

No Removal of Arbitrators by Court before Award has been Rendered. An agreement giving an opera company an option on the services of an operatic tenor in leading roles provided for arbitration of disputes under the Rules of the Basic Agreement of the American Guild of Musical Artists, and the American Arbitration Association. A controversy over the breach of the employment contract and the assessment of damages was submitted to arbitration where, during the proceedings, two arbitrators were challenged because of alleged lack of impartiality. The question was submitted under the Rules of the Association to the Arbitration Committee which, after a hearing, held that the allegation of partiality was not sustained, and the arbitrators continued in office. An application to disqualify the arbitrators was denied by the federal court for lack of jurisdiction since the contract of employment was not a matter of interstate commerce. The court, however, said that an opinion "may not be amiss, even as *obiter dictum,*" as to the question whether the court is vested with the power to

disqualify arbitrators, appointed pursuant to the contract of the parties, before a determination or award by the board of arbitrators. Said the court: "The parties, by their contract, voluntarily agreed to submit the dispute to arbitration in accordance with the rules of the American Arbitration Association. . . . . The rules thus were made a part of the arbitration clause of the contract. The dispute was submitted and the arbitrators were appointed pursuant to the terms of the contract and the rules of the American Arbitration Association. The arbitration proceeded according to the Rules and upon the movant's objection to the arbitrators a hearing was had before a special committee of the Association to pass upon the question. That practice appears to be in accord with the Rules. Rule IV, sub. 11-19 provides for the appointment of arbitrators and sets forth the qualifications and manner of appointment. Subdivision 18 provides that upon notice of appointment the prospective arbitrator is requested to disclose any circumstances that would create a presumption of bias or which he believes might disqualify him as an impartial arbitrator. Although the Rules of the Association do not provide in so many words for the removal of arbitrators, subdivision 19 of Rule IV does provide: 'If any arbitrator should resign, die, withdraw, refuse or be unable or disqualified to perform the duties of his office, the Administrator shall, on proof satisfactory to it, declare the office vacant.' The procedure before the special committee of the Administrator then appears to have been the customary practice and to be a determination of the question involved in Conley's objection to the arbitrators in accordance with Subdivision 19 of Rule IV.

The application to the court for the removal of the arbitrators is not one of the remedies set forth in the U. S. Arbitration Act, 9 U.S.C.A. 1, *et seq.* For the court to entertain the application, would amount to the exercise of a right to change the terms of the contract. *See Modern Brokerage Corp. v. Massachusetts B. & I. Co.*, (S.D.N.Y. 1944) 56 F. Supp. 696. . . . . The power of the courts, to set aside an award of a board of arbitrators, after bias or prejudice is shown, is well settled. Sections 10-12, U. S. Arbitration Act (9 U.S.C.A. Sec. 10-12); *Williston, Contracts*, Sec. 1923-A; *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N.Y. 398. But where the dispute has proceeded to arbitration, the court does not appear to have the power to order a substitution of arbitrators. . . . . It has been held that where there was an arbitration by consent of the parties, even though such arbitration be made a rule of the court, the court has no general power, without the consent of the parties, to make a substitution of arbitrators. *Smith v. Warner*, 14 Mich. 152.

If the arbitrators have been appointed by the court, and the question of the disqualification of the arbitrator is raised before the arbitration has commenced, it appears the court has the power to modify or change its original order by effecting a change of arbitrators for cause shown. See, *Western Union Telegraph Co. v. Selly*, (Sup. Ct. N.Y.) 60 N.Y.S. 2d 411, aff'd 61 N.Y.S. 2d 911.

Where a party to an arbitration has knowledge of facts possibly indicating bias or prejudice on the part of an arbitrator he cannot remain silent and then later object to the decision of the arbitrators on that ground. His silence and inaction constitute a waiver of the objection. *Chicago &*

Rock Is. R. R. Co. v. Union Pacific R. Co., 254 Fed. 235. Here, however, Conley has made timely objection before the arbitrators and before the Administrator under the Rule of the American Arbitration Association. Since such objection has been overruled, in my view of the matter, he should proceed with the arbitration pursuant to the terms of his contract. He thus will exhaust his remedies within the Rules of the Association and he will not be precluded from reasserting his objection, if necessary, when the confirmation of the award of the arbitrators comes before the proper judicial tribunal." *San Carlo Opera Company v. Eugene Conley*, U.S. District Court, Southern District of New York, Civil 36-732, August 12, 1946; Leibell, J.

Impartiality of Arbitrator Challenged. An arbitrator served as a labor member of a three-man panel of the War Labor Board which, on July 23, 1945, heard a dispute between the same parties which involved among other matters the identical question to be decided by the arbitrator. An objection was raised by the corporation at the arbitration hearing but overruled by the arbitrator. The award sustaining the claim of the union that the company employed non-members of the union contrary to the collective bargaining agreement, was vacated and a rehearing before a new arbitrator directed. Said the court: "Without in any way desiring to reflect upon the honesty and integrity of the person selected as arbitrator, it is difficult to believe that he had not formed some opinion as to the coverage of the agreement in question at the hearing held on July 23, 1945. Timely objection was made by petitioner to the question of the arbitrator's impartiality." *Osman, President, Wholesale and Warehouse Workers Union, Local 65, CIO v. Belding Heminway Co.*, N.Y.L.J., August 13, 1946, p. 255; Dickstein, J.

Exclusive Jurisdiction of Arbitrators as to Interpretation of Contract. A collective bargaining agreement provided that if the parties be unable satisfactorily to adjust a grievance "as to the interpretation or application of any provision of the agreement," the controversy shall be referred to an arbitrator to be appointed by the Director of Conciliation of the U. S. Department of Labor. The union, recognized by the agreement as agent for the employees, claimed back-pay benefits for one of its members who had left the employ six months before the agreement was made. The corporation, contending that the contract did not cover such employee in any way, sought to stay an order of arbitration obtained by the union pursuant to the collective bargaining agreement. The stay, however, was denied on the ground that "although the issue presents a question of law as to the interpretation of the contract, nevertheless it appears that where there is no substantial issue as to the making of the contract or the failure to comply therewith and where they have voluntarily agreed to submit to arbitration 'a grievance as to the interpretation or application of any provision of the agreement,' all acts subsequent to the making of the contract which raise issues of fact or law lie exclusively within the jurisdiction of the arbitrators." *Graphite Metallizing Co. v. De Rosa*, N.Y.L.J., August 22, 1946, p. 317; Bailey, J.

Determination of Wage Question by Arbitrators. A collective bargaining agreement provided for arbitration of controversies including disputes regarding the interpretation of the agreement. A motion to stay arbitration was denied for the reason that "it is for the arbitrators to determine whether the wages in controversy are to be fixed by resort to the [Directive] Order [of the National War Labor Board] of November 2, 1945, or independently of that Order." *Textile Workers Union of America, CIO v. Julius Kayser & Co.*, N.Y.L.J., March 11, 1946, p. 965, Miller, J.; aff'd 62 N.Y.S. 2d 584.

Scope of Arbitration Issue Should not be Disregarded by Arbitrator. An arbitration was limited to the claim of unlawful discharge of two members of a union whose reinstatement with back-pay was sought. The arbitrator moreover considered the claim of a third employee, contributions or payment to the union welfare fund, and tips and gratuities received by employees which by terms of the contract were not wages within the purview of the collective bargaining agreement. The award was vacated insofar "as the arbitrator went beyond the limits of the matters stated in the alleged notice to be submitted to him and the scope of the claimed controversy." *United Culinary Bar and Grill Employees Local 923, CIO v. Schiffman*, N.Y.L.J., June 29, 1946, p. 2558; Hammer, J.

Award Cannot be Supported by Implications Inconsistent with Actual Facts. A dispute involving the question of one-man-operation of doubledecked busses was submitted to an arbitrator appointed by the War Labor Board. The award stated that "one-man operation" was not in issue since the parties had agreed to such system and were now only concerned with conditions under which it could be effectuated. The award, however, was vacated as not definite upon all the subject matter submitted to arbitration. Said the court: "The court may not, under the guise of inference, supply an answer which the arbitrator failed to make, although he could have done so by the mere use of the simple affirmative. In short, no award can be supported by implications inconsistent with the actual facts." *MacMahon, President, Transport Workers Union of America, Local 100, CIO v. Fifth Avenue Coach Company*, 63 N.Y.S. 2d 657.

Court Not Restricted to Allowance of Statutory Fees of Arbitrator. Sec. 1457 C.P.A. provides that, unless otherwise expressly provided in a submission to arbitration or the contract to arbitrate, the fees of an arbitrator shall not exceed the fees of a referee. Sec. 1545 C.P.A. provides that "for each day spent in the business of a reference, the referee shall be entitled to $25.00 . . . . unless a different rate is fixed by the court or by consent." In an arbitration agreement the parties did not fix the compensation of an arbitrator, nor did the court in designating the arbitrator fix the rate of compensation. The court, in confirming the award, fixed the arbitrator's fee for services for thirty-five days at $1,500 to be paid by the respondent; the Appellate Division, however, held that the fees of an arbitrator unless otherwise determined should only be $25 for each day.[1] The Court of

[1] 270 App. Div. 267, 59 N.Y.S. 2d 8, digested in *The Arbitration Journal*, p. 93.

Appeals reversed this decision, affirming the judgment of the Special Term, in holding: "The allowance made by the Special Term was lawful under Secs. 1457 and 1545 of the Civil Practice Act." The Chief Justice and another judge dissented "on the ground that the Appellate Division correctly construed Secs. 1457 and 1545 of the Civil Practice Act." *Dubinsky, President, International Ladies' Garment Workers' Union v. Joseph Love, Inc.*, 295 N.Y. 968, 68 N. E. 2d 53.

FOREIGN ARBITRATION

England

No Court Review of Awards of Special Arbitral Tribunals. A claim was advanced with regard to compensation payable for the taking over of buildings under the Compensation (Defence) Act, 1939, which Act laid down certain rules for fixing the compensation to be paid by the Government. Sec. 7 of the Act sets up a tribunal called the General Claims Tribunal to which the task of fixing the amount of compensation is entrusted. The question arose whether an award of that Tribunal can be set aside by the Court on the ground of error of law on its face. The court held that "in the case of new tribunals set up under statute, no appeal will lie unless the right of appeal is confessed expressly or implicitly by statute, and accordingly where, as in the present case, no right of appeal is given, their decisions are not appealable." Thus, the General Claims Tribunal was considered a special tribunal which fell outside the category of arbitration tribunals and which was governed exclusively by its own code. *Racecourse Betting Control Board v. Secretary of State for Air*, (1944) 1 All England Reports 60.

British Statute of Limitation Applicable to Arbitration. Prior to the Limitation Act, 1939, the Statute of Limitations did not apply to statutory arbitration. Its section 27(3) provides that "an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated." The question of a timely arbitration arose in a case of compensation for an employee who was transferred from the London County Council to the London Passenger Transport Board. The court considered the claim not barred, after the expiration of six years, because the initiation of arbitration had occurred within the prescribed time. *Layen v. London Passenger Transport Board*, (1944) 1 All England Reports 432.

France

Arbitration Clause in Collective Bargaining Agreement Bars Court Action. A recent decision of the French Court of Cassation, the highest court of the country, again laid down the principle that the party to an arbitration agreement, whenever the other party does not comply with its provisions,

has the right to ask the court to appoint an arbitrator for the defaulting party.

An employment contract of an insurance company provided for the settlement of all future disputes by two arbitrators selected by each party, the company and the employee. The company refused to appoint its arbitrator in a dispute for payment of damages for dismissal of the employee. The competent court, the Civil Tribunal of Strasbourg, could not be applied to for the appointment, in view of the enemy occupation of Alsace. The employee initiated a lawsuit, but the highest court of the country did not approve of this procedure. In reversing decisions of the lower courts, it held: "When parties to a contract have agreed to refer to arbitrators designated by each of them, any controversy which may arise with regard to its execution, both parties have obliged themselves, by this clause, not to engage the law courts for the adjudication of a controversy which divides them, but to refer it to an arbitral tribunal. . . . . After having designated his arbitrator and having asked his adversary to designate one within the time limit, Lamoit could only request the ordinary court to designate an arbitrator instead of and in place of the one which the insurance company should nominate." *Cie d'assurance L'Alsacienne Vie c. Lamoit*, Cour de Cassation, *Gazette du Palais*, n°' 86-88, March 27-29, 1946, p. 1, col. 3.

Arbitration Under Collective Bargaining Agreement Does Not Violate Public Policy Determining Institution of Labor Courts. A collective bargaining agreement of 1936 between the French Bankers Association and the Federation of Unions of Bank Employees provided that controversies with regard to the application of the agreement if not settled in a conciliation procedure provided for in the agreement, should be submitted to arbitration. An employee of the Banque de Savoie in its agency in Chambery who was designated for employment in another city, refused to take up this job and was therefore discharged. The employee initiated a lawsuit against his former employer for damages in claiming that the refusal to change the employment from one city to another did not afford a valid reason for discharge under the collective bargaining agreement. The bank objected to a suit before the ordinary labor court (*Conseil de Prud'hommes*) because of the arbitration provision of the collective bargaining agreement. The labor court and the Court of Appeals were of the opinion that the arbitration provision of the collective bargaining agreement only referred to collective controversies and not to individual cases inasmuch as it would violate the public policy determining the institution of labor courts, and further that during the hostilities the mechanism of conciliation and arbitration under collective bargaining agreements was suspended. The Court of Cassation, the highest court, however, reversed the decision in stating: "None of these reasons justify the decision appealed from, inasmuch as it did not recognize to the provisions of the collective bargaining agreement the effect to establish an incompetence of jurisdiction of labor courts, and thus violated that collective bargaining agreement."

It may be noted that Art. 31 of the French Labor Code provides as follows: "Provisions of collective bargaining agreements are valid by

which the parties refer to designated arbitrators, or to arbitrators to be designated in the manner determined in the collective bargaining agreement, the adjudication of all or part of the controversies which may arise out of the execution of that agreement." *Banque de Savoie c. Demoiselle Val*, Cour de Cassation (Ch. Soc.), May 20, 1945, *Questions prud'hommales, fiscales et commerciales*, No. 316, November 15, 1945, p. 184.

Germany

Confirmation of Award by Appeal Board of Arbitration. An award rendered by the German Appeal Board of Arbitration for the Theatrical Profession, published in *Droit d'auteur*, vol. 59 (1946) p. 21, deals with the compensation for a designer of decorations for an opera "Elisabeth of England" presented at a State Theater which decorations were used for another play. The arbitral tribunal adjudicated an amount of 1000 Reichsmark to the designer, and this award was confirmed by the Appeal Board of Arbitration which states: "The defendant has not contested that the arbitration proceeding was lawful and that the arbitral tribunal which had to adjudicate the issue, was competent. No reason exists therefore to deal with those questions."

BOOKS AND PUBLICATIONS

Arbitration as a Business Tool, by R. Emerson Swart, Dun's Review, March 1946, p. 23. The President of the American Arbitration Association describes arbitration as a democratic and self-regulatory method of settling voluntarily controversies.

Toward World Arbitration—Nations to Study System to Settle Trade Disputes, by Sylvia F. Porter, N. Y. Post, April 16, 1946, discusses the different systems of commercial arbitration and especially the working of the Western Hemisphere services.

Arbitration in Settlement of International Trade Disputes, by Morris S. Rosenthal, Law and Contemporary Problems (Duke University) vol. XI (1946) p. 808-834, deals with the means and procedures to settle by arbitration commercial disputes which otherwise would be a barrier to international trade.

Foreign Bondholders Protective Council, Inc. Report for Years 1941 through 1944. New York, 1945. 871 pp. $10.50.

Controversies which will arise in the forthcoming liquidation of foreign bond-obligations will cover a large interest of American economy. Nearly half of the outstanding $4,700,000,000 foreign dollar bonds were in default as of December 31, 1944, covering 1,079 issues of 41 foreign countries. The Committee on Post-War Foreign Investments of the National Association of Manufacturers recently recommended the setting-up of an international organization to deal with such controversies (see *International Arbitration Journal,* 1945, p. 42), and the establishment of International Loan Tribunals has been advocated by the International Institute for the Unification of Private Law in Rome, Italy. Discussion of those suggestions will for a long time to come need factual material and background documentation. Such data have been compiled in the valuable survey of the Foreign Bondholders Protective Council covering its activities during the years 1941-1944.

The Trend of Arbitration by John T. McGovern, N. Y. State Bar Association Bulletin, Vol. 18 (1946) p. 59, contains interesting statements and experiences by the Chairman of the Arbitration Committee, Association of the Bar of the City of New York.

Annual Survey of American Law. 1942 Volume, 994 pp.; 1943 Volume, 962 pp.; 1944 Volume, 1252 pp., New York University School of Law, 1945 and 1946. $5.00 each volume.

The volumes consisting of a well-integrated series of monographs reviewing the years' developments in the various fields of public and private law are a most valuable source of current legal information. Each volume

includes a chapter on *Commercial Arbitration*, by Walter J. Derenberg, commenting upon federal legislation embodying arbitration provisions and statutory amendments in the different states, and surveying leading decisions on commercial arbitration, both in federal and state courts.

Conflicts—Arbitration—Confirmation of Award, Agreement to Submit Future Disputes concerning Maintenance Payments, and *Removal of Arbitrator—Political and Economic Bias* are the subjects of three notes in Columbia Law Review, vol. 46, p. 325, 841 and 845, commenting upon the *Red Line Commercial, Robinson* and *Western Union* cases, digested in *The Arbitration Journal*, p. 89, 230 and 328.

Waiver of Arbitration Provision in Contract, by R. P. Davis, Annotated Law Reports Vol. 161 (1946) p. 1426, comments in an extensive note on the arbitration case of *Almacenes Fernandez S. A. v. Golodetz*, 148 F. 2d 625, dealing with the question of fraudulent representation in the performance of a contract for shipment of caustic soda to Mexico.

The Clause Compromissoire: Its Validity in Quebec, by W. S. Johnson, K. C., Montreal (437 St. James Street), 1945. 166 pp. $2.75.

Dr. Johnson, the author of the leading Canadian treatise on conflict of laws, devotes a most interesting study to the question as to whether a future arbitration clause is valid and enforceable in Quebec. The author supports arguments for its recognition by numerous references to history and case-law, hardly available elsewhere, which will be of use far beyond the practice in Quebec. He presents, at the same time, a valuable survey of the influence of foreign (French) common law.

Del Arbitraje Commercial Internacional, by Alvaro Herran Medina, Bogota, Colombia, 1944, 240 pp.

This study by a Colombian lawyer on the general aspects of international commercial arbitration is based primarily on the practice of arbitration in Colombia and the interpretation of its modern arbitration law of 1938. Numerous other aspects of international commercial arbitration and the practice in the various countries of the Western Hemisphere are described in an illuminating way.

La Clausula Compromisoria, by Alberto y Alfredo Farhi. Valerio Abeledo, Buenos Aires, 1945, 102 pp.

This interesting study of Argentine lawyers on domestic legislation on arbitration and the practice of civil and commercial arbitration in Argentine refers to many instances of Western Hemisphere facilities, and to Argentine court decisions, a valuable presentation of source material.

Juizo Arbitral, by Armando Fairbanks, Revista Forense (Rio de Janeiro), Fasciculo 500 (1945) p. 277, presents in an article on Arbitral Awards a summary of Brazilian arbitration law and practice, with references to the history of Roman arbitration.

L'Arbitrage Volontaire en Droit Prive, by Alfred Bernard. Emile Braylant, Bruxelles, 1937. 616 pp.

An excellent study on "Voluntary Arbitration in Private Law" describing French and Belgian arbitration law and practice, and a comparative survey of treaties, statutory provisions and cases dealing with conflict-of-law-rules in arbitration practice, with valuable references to many European legal sources.

Latin American Commercial Law in United States Cases, by Gordon Ireland. Catholic University of America Press, Washington, 1945. 116 pp. $3.75.

Extracts from case opinions offer some of the basic principles of civil law, as applied in American courts, necessary for the understanding of legal questions sometimes occurring in arbitration proceedings, like contracts, partnerships, and proof of foreign law.

An Outline of Arbitration Procedure (Revised to June 1, 1946). Prepared by the Committee on Arbitration, The Association of the Bar of the City of New York. 16 pp.

An up-to-date revision of a most useful pamphlet containing references to leading N. Y. decisions and some forms for use in arbitration proceedings.

The British Yearbook of International Law, 1944. Oxford University Press, London, 1945. 272 pp. $7.00.

Among the many interesting contributions in articles and digests of court decisions in this twenty-first volume, some may lead to further considerations on questions involving the settlement of controversies, such as Mervyn Jones, *International Agreements Other than "Interstate Treaties,"* F. A. Mann, *The Law Governing State Contracts*, C. J. Colombos, *The Unification of Maritime International Law in Time of Peace.*

Charter of the United Nations. Commentary and Documents, by Leland M. Goodrich and Edvard Hambro. World Peace Foundation, Boston, 1946. 400 pp. $2.50.

A careful analysis of the articles of the Charter and the many documents which form the background material, with bibliography and numerous references to official publications. Of special interest are the comments on Chapter VI: Pacific Settlement of Disputes.

The International Control of Radiocommunications, by John D. Tomlinson. J. W. Edwards, Ann Arbor, Michigan, 1945. 314 pp. $2.50.

This study originally presented as a dissertation at the University of Geneva, Switzerland, deals with the international aspects and significance of radio-communication. Tracing the history of radio-regulation through international agreements and the manifold measures of control, it includes also at p. 284 arbitration provisions of such agreements. The forthcoming conclusion of new Conventions makes this presentation of background material of special value.

Getting into Foreign Trade, by Eugene Van Cleef, The Ronald Press Company, New York, 1946. 133 pp. $2.50.

Methods of foreign sales are explained to those in the business world or in government service. Among the trade operations well considered in their different aspects, arbitration has been mentioned and the Western Hemisphere services in commercial arbitration. Bibliography with numerous references.

How to Arbitrate a Labor Dispute, by Theodore W. Kheel. Prentice-Hall, N. Y., 1946. 20 pp.

This pamphlet of the former Executive Director of the National War Labor Board describes voluntary arbitration and its various forms and procedures and the different techniques involved in its use. Reference is made throughout to the new Prentice-Hall Labor Arbitration Service.

Labor Policy and Labor Relations. Proceedings of the Academy of Political Science, Vol. XXII, No. 1 (May 1946). Part II "The Settlement of Labor Disputes" contains several addresses, among them Sam A. Lewisohn on *Human Relations in Industry;* John T. Dunlap on *Fact-finding in Labor Disputes;* and E. Wight Bakke on *How to Promote Labor Peace.*

Labor and the Law, by Charles O. Gregory, Norton, N. Y., 1946. 467 pp. $5.00.

This book by a law professor of Chicago University deals primarily with the historical development of labor unions and the influence of court decisions on the growth of union power. Arbitration is considered briefly in a chapter on the functioning and enforcement of collective bargaining agreements.

Transportation Principles and Problems, by Truman C. Bigham, McGraw-Hill, N. Y. 626 pp. $5.00.

This valuable study deals with the development and policy regarding railroads, motor carriers, air transports and waterways. It devotes a succinct chapter (XXI) to labor, presenting the history of settlement of railroad labor disputes from the 1888 Act to the 1936 amendment of the Railway Labor Act of 1926.

Proceedings of the First Bay Area Institute of World Trade, University Extension, University of California, 1946. 111 pp.

The proceedings sponsored by the San Francisco Bay Area World Trade Promotion Committee explore and discuss many of the problems related to an expansion of world trade and include in appendices forms in use in foreign trade transactions.

Specific Performance—Option to Purchase at Price to be Fixed by Appraisers—Contract for Submission to Arbitration, is the subject of a note by Roland J. Wendorff, in Wisconsin Law Review 1946, p. 320, dealing with the case of *Depies-Heus Oil Company v. Sielaff*, 246 Wis. 36, 16 N.W. 2d 386 (1944).

DOCUMENTATION

1946 AMERICA-MANCHESTER (ENGLAND) ARBITRATION AGREEMENT

The Manchester (England) Chamber of Commerce and the American Arbitration Association recently reestablished their agreement to facilitate the use of commercial arbitration in trade between firms in Manchester and other adjacent parts of England and in the United States of America. The two cooperating organizations agreed to recommend to their members and others that firms engaged in such trade shall insert in their contracts the following clause:

> "This Contract incorporates the 1946 America Manchester (England) Arbitration Agreement by which each party hereto is bound."

The terms of the agreement referred to in this clause are as follows:

> If at any time any question, dispute or difference shall arise between the parties hereto upon or in relation to or in connection with the contract or for the breach thereof, either party may give the other notice in writing of the existence of such question, dispute or difference and the same shall be referred to arbitration. The party giving such notice shall simultaneously furnish a copy to the President of the Manchester Chamber of Commerce and the President of the American Arbitration Association. When the parties agree that the arbitration is to be held in the United States it shall be held either under the rules of the American Arbitration Association or under the rules of the Chamber of Commerce of the State of New York, or under the rules of the General Arbitration Council of the Textile Industry, as the parties may agree. Should they fail so to agree, the arbitration shall be held under the rules of the first named.
>
> When the parties agree that the arbitration shall be held in Great Britain it shall be held under the rules of the Manchester Chamber of Commerce Tribunal of Arbitration.
>
> Should the parties fail to agree as to the country in which the arbitration should be held, the party which shall have first given notice of the existence of the question, dispute or difference shall, or the other party may, notify the President of the American Arbitration Association and the President of the Manchester Chamber of Commerce of such disagreement, furnishing copies of correspondence relating to the choice of a place of arbitration. The President of the American Arbitration Association and the President of the Manchester Chamber of Commerce shall then determine where in their opinion the arbitration should take place. They shall notify both parties of their conclusions and the arbitration shall forthwith be held in the place determined by them. If such Presidents are unable to agree they or either of them

shall request the President or acting President of the International Chamber of Commerce to determine the place of arbitration and his decision shall be final.

1946 RECIPROCAL TRADE AGREEMENT BETWEEN THE UNITED STATES AND PARAGUAY

ARTICLE XIII. 1. The Government of the United States of America and the Government of the Republic of Paraguay agree to consult to the fullest possible extent in regard to all matters affecting the operation of the present Agreement. In order to facilitate such consultation, a Commission consisting of representatives of each Government shall be established to study the operation of the Agreement, to make recommendations regarding the fulfillment of the provisions of the Agreement, and to consider such other matters as may be submitted to it by the two Governments.

2. If the Government of the United States of America or the Government of the Republic of Paraguay should consider that any measure adopted by the other Government, even though it does not conflict with the terms of this Agreement, has the effect of nullifying or impairing any object of the Agreement, such other Government shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a mutually satisfactory adjustment of the matter.

1945 INTER-AMERICAN TELECOMMUNICATION CONVENTION

Chapter VII: Arbitration. Article 29: Regulations and Procedure.*

1. In case of dispute betwen two or more contracting governments concerning the execution of either the present Convention or its Regulations, the dispute, if it is impossible to settle it through diplomatic channels, shall be submitted to arbitration at the request of one of the governments in disagreement.

2. If the parties in disagreement agree to adopt a procedure already established by bilateral or multilateral treaties concluded between them for the settlement of international disputes, or the procedure provided for in Sec. 6 of this Article, the arbitrators shall be appointed in the following manner:

1) The parties shall decide, after mutual agreement, whether the arbitration is to be entrusted to individuals or to governments; failing an agreement on this matter, governments shall be resorted to.
2) In case the arbitration is to be entrusted to individuals, the arbitrators may not be of the same nationality as any one of the parties concerned in the dispute.
3) In case the arbitration is to be entrusted to governments, the latter should be chosen from among the parties adhering to the agreement, the application of which caused the dispute.

* Translation from the French original by American Arbitration Association; see *supra*, p. 282.

3. The party appealing to arbitration shall be considered as the plaintiff. This party shall designate an arbitrator and notify the opposing party of the choice. The defendant must then appoint a second arbitrator, within two months after the receipt of plaintiff's notification.

4. If more than two parties are involved, each group of plaintiffs or of defendants shall appoint an arbitrator, observing the same procedure as in Sec. 3.

5. The two arbitrators thus appointed shall agree in designating a third arbitrator. If the arbitrators are individuals and not governments, the third arbitrator should not be of the same nationality as either of the arbitrators or either of the parties involved. As to the designation of the third arbitrator, each arbitrator shall propose an arbitrator not concerned in the dispute. The third arbitrator shall then be drawn by lot between those proposed. The drawing of lots shall be done by the representative of an American government which is not involved in the dispute and which is chosen by the two arbitrators.

6. Finally, the parties in dispute shall have the right to have their disagreement settled by a single arbitrator. In this case, they shall agree on the choice of the arbitrator, and designate him in conformity with the method indicated in Sec. 5.

7. The arbitrators shall be free to decide on the procedure.

8. Each party shall bear the expenses it shall have incurred in the investigation of the dispute. The cost of the arbitration shall be apportioned equally among the parties involved.

9. If in spite of the text of Sections 2 to 8 inclusively, of this Article, an international agreement, of general application, for the arbitration of controversy between governments, is in force, the provisions of that agreement shall prevail to the extent that they will be applicable in the respective countries of the American region, instead of that which has been provided for in the foregoing sections.

LIQUIDATION OF GERMAN ASSETS IN SWITZERLAND

(Arbitration Provisions of Art. III, Annex to the Accord of May 29, 1946; See *Supra*, p. 280)

If the Joint Commission after consultation with the Compensation Office is unable to agree to the decision of that office, or if the party in interest so desires, the matter may within a period of one month, be submitted to a Swiss Authority of Review. This Authority shall be composed of three members and shall be presided over by a judge. This review will be administrative in form and the procedure shall be prompt and simple. The decisions of the Compensation Office, or of the Authority of Review, should the matter be referred to it, shall be final.

Nevertheless, if the Joint Commission is in disagreement with any decision of the Authority of Review, the three Allied Governments may, within one month, require the difference to be submitted to arbitration as follows: if the difference concerns matters covered by the Accord or the Annex or their interpretations, the difference may, if the Allied Governments desire, be submitted to an Arbitral Tribunal. This Tribunal shall be composed

of one member designated by the three Allied Governments, a member designated by the Swiss Government, and a third member designated by the four Governments. Any such difference which is not of primary importance may, if the Joint Commission and the Compensation Office agree, be submitted for decision to the member of the Tribunal who has been designated by agreement of the four Governments, who in such cases will sit as the Arbitral Tribunal.

The Arbitral Tribunal will not be restricted as regards the nature or proof of evidence produced before it and will have full jurisdiction to consider all matters of fact or law submitted to it.

The decision of the Arbitral Tribunal shall be final.

The expenses of the Arbitral Tribunal shall be a charge on the proceeds of the liquidation of German property, before their division.

ARBITRATION RULES OF THE AMERICAN SPICE TRADE ASSOCIATION

(STANDARD ARRIVAL CONTRACT)

15. ARBITRATION.—The following regulations shall govern all arbitrations held under this contract.

A. Quality.—Unless it can be shown by the buyer that it was impossible to do so, arbitration of all disputes as to quality of merchandise and/or claims for allowance in price between buyer and seller shall be demanded within ten business days after the parcel is landed, and samples shall be drawn from the parcel on the wharf unless the entire parcel shall have been meanwhile stored in public warehouse, in which case samples shall be drawn within five business days after the parcel shall have been so housed and arbitration shall be held within six weeks of arrival of vessel. Individual samples for arbitration shall be drawn and sealed by a public sampler in the presence of representatives of both parties to the contract and shall be drawn from at least 10 per cent of each chop or invoice. Failure promptly to appoint a representative to supervise sampling will be considered as a waiver of the privilege and samples drawn in good faith by order of the other party, shall be used by the arbitrators.

B. Arbitrators.—Each disputant shall appoint a disinterested member of the Association as arbitrator. If either disputant shall neglect to appoint an arbitrator within three business days after notice in writing is received by him from the other disputant of the appointment of his arbitrator, the President shall appoint the other arbitrator upon a written request from either party to the dispute. Disputants may appoint one person to act as sole arbitrator.

C. Umpire.—The two arbitrators shall select a third disinterested member of the Association as umpire, who shall meet and act with the arbitrators in the decision of the arbitration, and shall act as Chairman thereof. If the arbitrators shall fail to select the umpire within seven business days from their appointment, the President shall appoint the umpire upon request in writing from either arbitrator. Both parties shall be duly notified of the date of hearing and entitled to be present thereat.

D. Disinterested Member.—A disinterested member of the Association

shall be deemed to be one who will not be directly affected by the decision of the arbitration on which he is required to serve as arbitrator, umpire or member of the Arbitration Committee. No disinterested member may refuse any reasonable request of any other member to act as arbitrator or umpire. The President and members of the Arbitration Committee (except Alternates) shall not be eligible to serve as arbitrators or umpires.

E. Award.—The award of such arbitrators and umpire or sole arbitrator shall be final and binding on both parties, unless within three business days after receipt of the award, an appeal with a fee of $50 be lodged with the Secretary of the Association by either disputant. Settlements under an arbitration award or award of the Arbitration Committee shall be made within ten days from the date of such award, and if not so settled, judgment may be entered thereon in accordance with the practice of any Court having jurisdiction.

F. Appeal.—All appeals shall be heard by the Arbitration Committee, which shall consider cases decided by arbitrators and umpires, and shall sustain, reverse or modify same. They shall have the right to remand appeals to the arbitrators and umpires for re-arbitration. If, on any appeal any member of the Arbitration Committee shall be an interested party in the transaction, or contract in question, his place shall be taken for that appeal by the member on the list of Arbitration Committee Alternates next in rotation for service. Three business days' notice of the hearing of the appeal shall be given by the Secretary to the disputants and to the arbitrators and umpire whose award is appealed against, and they shall be entitled to be present and to be heard upon the matter in question. Not less than five of the Arbitration Committee being present, the decision of the majority shall be the final and binding decision of the appeal.

G. Briefs.—On appeals, other than those involving quality only, each appellant and respondent shall deliver to the Secretary of the Association seven copies of the brief or statement covering his case, duly sworn to, at least 48 hours before the time set for the appeal.

H. Fees.—Unless otherwise divided or awarded by the arbitrators and umpire, or the Arbitration Committee, the fees for arbitration or appeal shall be finally paid by the losing party. In event of arbitration between a member and non-member of the Association, the member must guarantee the payment of the fees or the non-member must deposit the fees with the Secretary before the arbitration is held, and adjustment shall be made after the award has been rendered.

The fees for arbitrators and umpires shall be $10 each in all cases, and in addition a $10 fee to the Association. In case the two disputants agree upon a single member, who shall act as the sole arbitrator, instead of two arbitrators and an umpire, the fee for the sole arbitrator shall be $20 in all cases, and in addition a $10 fee to the Association. If an appeal shall be decided in favor of the appellant, the appeal fee of $50 shall be returned to the appellant and the respondent shall pay the appeal fee of $50.

Arbitrators or umpires shall be awarded extra fees by the Arbitration Committee, if in the judgment of the Committee the said arbitrators and umpires shall have performed unusual or extraordinary services during the arbitration on which they shall have served.

I. Oaths.—In all arbitrations and appeals the arbitrators, umpire and members of the Arbitration Committee shall, before acting, subscribe to the usual legal oath of office. In all arbitrations and appeal hearings all witnesses and principles giving oral evidence shall be duly sworn in the usual manner. Awards must be legally acknowledged. All notary fees to be paid as awarded by the arbitrators or Arbitration Committee in case of appeal.

J. Offer of Settlement.—In every case involving dispute, where the arbitrators and umpire decide that the contract has been properly fulfilled by the seller, or in every case where the seller has before the arbitration offered settlement which is held by the arbitrators and umpire to be sufficient, but which the buyer refused to accept, the fees shall be paid by the buyer; but where the buyer has offered a settlement and the seller has refused to make such settlement, which the arbitrators and umpire finally decide is adequate, the fees shall be paid by the seller; provided, that all offers as above shall have been made in writing.

